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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA,
APPELLANT,

vs.

JOE HARRISON and PHIL C. KATZ, Public Administrator of the City and County of San Francisco.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 6, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA,
APPELLANT,

vs.

JOE BURNISON and PHIL C. KATZ, Public Administrator of the City and County of San Francisco.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the Supreme Court of the State of California

No. 102412

In the Estate of GUST BURNISON
also called GUSTAV BURNISON.
JOE BURNISON,
APPELLANT,
VS.
PHIL C. KATZ, as Public Administrator of the
City and County of San Francisco, and
THE UNITED STATES OF AMERICA,
RESPONDENTS.

Clerk's Transcript on Appeal

From an Order of the Superior Court of the State of California, in and for the City and County of San Francisco.

2

102412

Vol. 1143 Page 107
June 30, 1932
205—3rd St.,
San Francisco, California

This is my last Will & Wish
That I give all I own & possess to The United States goverenment U. S. A.
The benefreiory shall be excutor
My body shall be cremated after death

Signed GUST BURNISON
Approved July 27, 1944

3 In the Superior Court of the State of California
in and for the City and County of San Francisco,

No. 102412

Department No. 9

In the Matter of the Estate
of
GUST BURNISON, also called
GUSTAV BURNISON, Deceased.

(File Endorsement Omitted)

Petition for Probate of Will and for Letters of Administration with the Will Annexed—Filed March 11, 1946

To the Honorable, the Superior Court of the State of California in and for the City and County of San Francisco:

The petition of Phil C. Katz, as Public Administrator of the City and County of San Francisco, State of California, respectfully shows to the Court:

That GUST BURNISON, also called GUSTAV BURNISON, died on or about the 23rd day of February, 1946, at the City and County of San Francisco, State of California, and was at the date of his death, your petitioner is informed and believes and therefore avers, a resident of said City and County of San Francisco, and left estate in said City and County of San Francisco, State of California.

4 That the probable value and character of the estate of said deceased, as far as known to your petitioner, are as follows: Personal property, value unknown.

That said deceased left a document, filed herewith, said document bearing date the 30th day of June, 1932, purporting to be the last will and testament of said deceased, which said document, your petitioner is informed and believes and therefore avers, was entirely written, dated and signed by said decedent.

That at the date of the execution of said last will and testament said decedent was over the age of twenty-one years and was, your petitioner is informed and believes and therefore avers, of sound mind and not acting under any undue influence, fraud, or misrepresentation, and was in all respects competent to devise and bequeath all of his estate.

That the names, ages and places of residence of the heirs at law and next of kin of said deceased so far as known to your petitioner, are MRS. DENA IRVINE, sister, Keyboard, Washington, and the following brothers, JOHN B. BURNISON, Marquette, Kansas, JOSEPH BURNISON, Marquette, Kansas, and JULIUS BURNISON, McPherson, Kansas, all of legal age, and certain children of predeceased brothers and sisters, whose names, ages and places of residence are unknown to your petitioner.

That the legatee named in said will is THE UNITED STATES GOVERNMENT, U. S. A.

That in and by said last will and testament of said
5 decedent he named the beneficiary therein, i. e., The United States Government as Executor thereof; that said United States Government is not qualified to act as Executor;

That your petitioner is the duly appointed, qualified and acting Public Administrator of the City and County of San Francisco, State of California, and as such he is entitled to letters of administration with the will annexed on the estate of said deceased.

WHEREFORE, your petitioner prays that a time and place be fixed for the hearing of this petition, and that on said

hearing said document be admitted to probate as the last will and testament of said deceased, and that your petitioner be appointed administrator with the will annexed of the estate of said deceased, and that letters of administration with the will annexed on the estate of said deceased issue to your petitioner as Public Administrator, as aforesaid.

Dated: March 5, 1946.

PHIL C. KATZ /s
Petitioner

HENRY F. BOYEN /s
Attorney for Petitioner

June 30, 1932
205—3rd St.,
San Francisco, California

This is my last Will & Wish
That I give all I own & Possess to The United States goverenment U. S. A. The benefreiory shall be excutor.
6 My body shall be cremated after death

Signed GUST BURNISON
Approved July 27, 1944

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Order Admitting Will to Probate and for Letters of Administration with the Will Annexed—Filed May 7, 1946

Now comes the petitioner, PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, State of California, by HENRY F. BOYEN, ESQ., his attorney, and proves to the satisfaction of the Court that the time for hearing the petition for the probate of the will of decedent, and for letters of administration with the will annexed, filed herein on the 11th day of March, 1946, was by the Clerk duly set for the 2nd day of April, 1946, and regularly continued to the 7th day of May, 1946, and that notice of said hearing has been given as required by law; and no person appearing to contest said petition the Court proceeds to hear the evidence, and thereupon finds that all of the allegations of said petition are true and that said petition ought to be granted.

IT IS THEREFORE ORDERED AND ADJUDGED by the Court that said GUST BURNISON, also called GUSTAV BURNISON, died on or about the 23rd day of February, 1946, leaving estate in the State of California; that he was then a resident of San Francisco, California; that the instrument in writing, hereinbefore filed, purporting to be his last will and testament, and so alleged to be in said petition, be admitted to probate as the last will of said deceased; that said petitioner, PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, State of California, be appointed administrator with the will annexed of the estate of said deceased, and that letters of administration with the will annexed issue to him.

DONE IN OPEN COURT this 7th day of May, 1946.

T. I. FITZPATRICK /s
Judge of the Superior Court

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Letters of Administration with the Will Annexed—Filed May 7, 1946

State of California
City and County of San Francisco } ss.:

The last will and testament of GUST BURNISON, also called GUSTAV BURNISON, deceased, ~~having been~~ proved and recorded in the Superior Court of the State of California, in and for the City and County of San Francisco, PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, State of California, is hereby appointed administrator with the will annexed of the estate of said deceased.

WITNESS, H. A. VAN DER ZEE, Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, with the seal of said Court affixed this 7th day of May, 1946.

By Order of Court
H. A. VAN DER ZEE
Clerk

(Seal)

By M. J. FAHEY
Deputy Clerk

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Oath of Appraiser—Filed July 27, 1946

State of California)
City and County of San Francisco) ss.:

R. F. MOGAN, Appraiser of the estate of GUST BURNISON, also called GUSTAV BURNISON, deceased, being duly sworn, says: That he will truly, honestly and impartially appraise the property of said estate, which shall be exhibited to him, according to the best of his knowledge and ability.

R. F. MOGAN /s

Subscribed and sworn to before me this 12th day of June, 1946.

(Seal)

FRANK A. FLYNN
Court Commissioner in and for the
9 City and County of San Francisco
State of California

State of California)
City and County of San Francisco) ss.:

PHIL C. KATZ, Administrator with the Will Annexed of the estate of GUST BURNISON, also called GUSTAV BURNISON, deceased, being duly sworn, says: That the annexed inventory contains a true statement of all the estate of said deceased which has come to his knowledge and possession, and particularly of all just claims of said decedent against affiant.

PHIL C. KATZ /s

Subscribed and sworn to before me this 7th day of June, 1946.

(Seal)

ANNE F. SWIFT
Notary Public in and for the
City and County of San Francisco
State of California

Estate of GUST BURNISON, also called GUSTAV BURNISON, deceased.

To R. F. MOGAN, Appraiser, Dr.

To compensation for services in appraising said estate, item as follows: $22.65; Notary $1.00, Total, $23.65.

State of California
City and County of San Francisco } ss.:

R. F. MOGAN, the Appraiser above named, being duly sworn, says: That the foregoing bill of items is correct and just and that the services have been fully rendered as therein set forth.

R. F. MOGAN /s

Subscribed and sworn to before me this 12th day of June, 1946.

FRANK A. FLYNN
(Seal) Court Commissioner in and for the
City and County of San Francisco
State of California

Inventory and Appraisement

Moneys belonging to the decedent which have come to the hands of the Administrator:

Moneys received from:	
Don-Ra-Dae Hospital:	
Cash from effects	$ 3.27
Decedent's cash	42.15
American Business Shares, Inc. Div. 48 2/20/46	3.80
The Morris Plan Company of California Investment account (savings)	700.00
Wells Fargo Bank and Union Trust Co., savings acct.	5007.98

PERSONAL PROPERTY (Other than Cash)

Item

(1) 25 shares of Common capital stock of General Motors Corporation (Delaware corporation) Par value $10 per share. Certificate No. C 8720, dated January 12, 1929.

11 Appraised at $1887.50

(2) Receipt No. OF 12174, dated December 27, 1928, for 10 Ordinary Registered Shares of Ford Motor Company, Ltd. Par Value One Pound Sterling. Guaranty Trust Company of New York, Depositary.

Appraised at ..... $ 76.25

(3) 176 shares of Class A stock of Hearst Consolidated Publications, Inc. (Delaware corporation). Par value $25 each.

Certificate No.	No. of Shares	Dated
SF 2351	100	July 2, 1934
SF 066400	1	July 27, 1934
SF 069390	2	Sept. 17, 1934
SF 075368	1	Dec. 15, 1934
SF 091482	12	July 1, 1935
SF 0110021	20	Jan. 24, 1936
SF 0121190	20	March 22, 1937
SF 0123344	20	October 5, 1937

Appraised at.....$5500.00

(4) 5 shares capital stock of 300 Adams Building, Inc. (Illinois Corporation). Without par value. Certificate No. 160, dated May 1, 1935

Appraised at.....$ 500.00

(5) 60 shares of the capital stock of The Long-Bell Lumber Company, Kansas City, Mo.
12 (Missouri corporation, 1884) Par $5.00 each, Certificate No. 2749, dated August 2, 1943.

Appraised at.....$ 960.60

(6) 95 shares capital stock of American Business shares, Inc. (Delaware corporation 1932). Par value $1.00 each. Certificate No. 779991, dated Jan. 29, 1945.

Appraised at.....$ 456.00

(7) 30 shares capital stock of Irving Trust Company. (New York Corporation). Par value $10 each. Certificate No. AO73087, dated October 28, 1937.

Appraised at.....$ 573.75

(8) 430 shares capital stock of Perpetual Royalty Income Company. (Oklahoma corporation) Chickasha, Okla. Par value $1.00 each. Certificate No. 2868, dated January 10, 1920.

Appraised at.....$ Nil

(9) 95 shares preferred stock of C & C Developing Company Syndicate. (Delaware corporation). Par value $1.00 each. Certificate No. 1723, dated Dec. 29, 1924.

Appraised at.....$ 1.00

(10) 6 shares capital stock of American
13 Eagle Oil Company. A trust Estate, Kansas City, Mo., 1922. Par value $250.00 each. Trustees Certificates

Certificate No.	No. of Shares	Dated
13	1	November 4, 1924
24	1	February 24, 1925
51	1	July 7, 1925
61	1	October 5, 1925
93	2	September 1, 1926

Appraised at.....$ Nil

(11) 500 shares capital stock of The Lucky Tiger—Combination Gold Mining Co. (Arizona corporation). Par value $1.00 per share.

Certificate No.	No. of Shares	Dated
22355	100	Sept. 27, 1924
24875	100	May 8, 1928
26383	100	August 25, 1930
26384	100	August 26, 1930
26387	100	Sept. 5, 1930

Appraised at.....$ 875.00

(12) 1 $1000 United States Savings Bond. Series G. Issued as of December 1, 1942; due 12 years from date. (Issue price $1000). Certificate No. M 1 170 666 G

Appraised at.....$ 951.00

14 (13) 3 $1000 United States Savings Bonds. Series G. Issued as of July 1, 1943; due 12 years from date. (Issue price $1000 each). Nos. M 1 588 799 G
M 1 588 998 G
M 1 588 999 G

Appraised at.....$2868.00

(14) 1 $500 United States Savings Bond. Series G. Issued as of July 1, 1941; due 12 years from date. (Issue price $500). No. D-3018 G

Appraised at.....$ 500.00

(15) 1 $500 United States Savings Bond. Series G. Issued as of July 1, 1942; due 12 years from date. (Issue price $500). No. D 213 846 G

Appraised at.....$ 500.00

(16) 2 $100 United States Savings Bonds. Series G. Issued as of May 1, 1941; due 12 years after date. (Issue price $100 each) Nos. C 647 G; C 648 G

Appraised at.....$ 200.00

(17) 1 $500 3¾% External Dollar Bond of 1944, Series 3, Estados Unidos de Brasil (United States of Brazil). Interest payable June
15 1 and December 1. Temporary Bond No. TD 1570

Appraised at.....$ 300.00

(18) 3 $100 3¾% External Dollar Bonds of 1944, Series 3, Estados Unidos do Brasil (United States of Brazil). Interest payable June 1 and December 1. Temporary Bond Nos. TC6021, TC6022, TC6023.

Appraised at.....$ 60.00

(19) 2 $80 3¾% External Dollar Bonds of 1944, Series 5, Estados Unidos do Brasil, (United States of Brazil). Interest payable June 1, and December 1. Temporary Bond Nos. TB6800 and TB6801

Appraised at.....$ 48.00

(20) 1 $500 Income Registered Mortgage Bond No. D 144, The Congress and Senate Company, State of Missouri. Due December 1, 1944. Interest payable December 1 and June 1. Attached to said Bond is Voting Trust Certificate No. VD 144, dated August 6, 1937, for 5 shares Series A of the Congress and Senate Company.

Appraised at.....$ 397.00

(21) 1 $500 6% Republic of Chile External Sinking Fund Gold Bond, No. D 2798, due April 1, 1960. Interest payable April 1 and
16 October 1; interest coupons attached commencing No. 20, October 1, 1936 and subsequent coupons. (Subject to the provisions of Law No. 5580 of January 31, 1935, as regulated by Decree No. 1730 of May 17, 1938 and Decree No. 37 of January 4, 1936, of the Republic of Chile and Decrees issued subsequent thereto.)

Appraised at.....$ 120.00

(22) 1 $500 6% External Sinking Fund Gold Bond, First Series, No. D 2706, Republic of Peru, Peruvian National Loan. Due December 1, 1960. Interest payable June 1 and

December 1; interest coupons attached commencing No. 9, June 1, 1932, and subsequent coupons.

Appraised at.....$ 135.00

(23) 2 $1000 Farm Mortgage Certificates, Series B, The New England Securities Company, Kansas City, Mo. Date of maturity April 1, 1928. Interest payable April and October. Bond No. 98 with coupons attached No. 9 October 1, 1927 and No. 10 April 1, 1928. Bond No. 200 with coupons attached commencing No. 4 October 1, 1927 and subsequent coupons.

17 Appraised at.....$ Nil

(24) Yellow metal watch

Appraised at.....$ 5.00

TOTAL $22,668.70

As far as can be ascertained by the administrator, with the Will Annexed, all of the property mentioned in the foregoing inventory is separate property of the decedent.

I, R. F. MOGAN, the undersigned, appraiser of the Estate of GUST BURNISON, also called GUSTAV BURNISON, deceased, hereby certify that the property in the foregoing inventory described has been exhibited to and examined by me, and I appraise each item thereof as shown by the figures set opposite that item, and the whole thereof at the sum of Twenty-two Thousand Six Hundred Sixty-eight and 70/100 Dollars, ($22,668.70).

Dated: June 21, 1946

R. F. MOGAN /s
Appraiser

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

18 *Petition for Partial Distribution—Filed Oct. 18, 1946*

To the Honorable the Superior Court of the State of California, in and for the City and County of San Francisco:

Your petitioner, JOE BURNISON, on his own behalf, as an heir at law of the above named deceased, and on behalf of JOHN W. BURNISON, GENEVA PETERSON, EDNA YOUNG, GLEN

INGEMANSON, LESLIE INGEMANSON, EARLINE FURGESON, ELSIE HUDSON, JULIUS BURNISON, ELMA SAYLOR, MILDRED BOYDSTON, LEONARD INGEMANSON, BLENDA RITCHERD, VIVIAN STWALLEY, DENA IRVINE, LINNEA TURNER and MANARD VANN, as heirs at law of said deceased, respectfully represents:

I

That GUST BURNISON, also known as GUSTAV BURNISON, died testate on or about the 23rd day of February, 1946, leaving surviving him as his heirs at law entitled to succeed to the estate of said deceased, the following named persons:

NAME	RELATIONSHIP	ADDRESS
JOHN W. BURNISON	Brother	Marquette, Kansas
JOE BURNISON	Brother	Marquette, Kansas
GENEVA PETERSON	Niece	Marquette, Kansas
EDNA YOUNG	Niece	Marquette, Kansas
GLEN INGEMANSON	Nephew	Marquette, Kansas
LESLIE INGEMANSON	Nephew	Marquette, Kansas
EARLINE FURGESON	Niece	Marquette, Kansas
ELSIE HUDSON	Niece	Marquette, Kansas
JULIUS BURNISON	Brother	McPherson, Kansas
ELMA SAYLOR	Niece	McPherson, Kansas
MILDRED BOYDSTON	Niece	McPherson, Kansas
LEONARD INGEMANSON	Nephew	Topeka, Kansas
BLENDA RITCHERD	Niece	Hutchinson, Kansas
VIVIAN STWALLEY	Niece	Ellsworth, Kansas
DENA IRVINE	Sister	Key Port, Wash.
LINNEA TURNER	Niece	Idaho Springs, Colo.
MANARD VANN	Nephew	Address unknown

That petitioner is informed and believes, and on said information and belief alleges that the persons above named are all of the heirs at law of said deceased, and that deceased left surviving him no heir or heirs at law other than the persons named herein above.

II

That on the 7th day of May, 1946, in the above entitled proceeding the will of deceased was admitted to probate and letters of administration with the will annexed were duly issued to PHIL C. KATZ, Public Administrator of the City and County of San Francisco, State of California, who ever since has been and still is the duly appointed, qualified and acting administrator with the will annexed of the estate of the above named deceased.

III

That notice to creditors of said deceased was first published May 8, 1946; that more than four (4) months has elapsed since the issuance of letters of administration with the will annexed and the first publication of notice to creditors.

20 IV

That the total value of said estate, as appears by the inventory and appraisement on file herein, is the sum of TWENTY-TWO THOUSAND SIX HUNDRED SIXTY-EIGHT AND 70/100 ($22,668.70) DOLLARS.

V

That your petitioner is informed and believes and on said information and belief alleges that the claims presented against said estate do not exceed the sum of ONE THOUSAND ($1,000.00) DOLLARS, and that all of said claims except a claim of TWO HUNDRED TEN AND 35/100 ($210.35) DOLLARS filed by the City and County of San Francisco, State of California, have been allowed and paid in full; and that the said estate is in no wise indebted except to the said City and County in the said sum of TWO HUNDRED TEN AND 35/100 ($210.35) DOLLARS, and for taxes, costs and expenses of administration.

VI

Your petitioner further alleges that the will of deceased names the "UNITED STATES GOVERNMENT, U. S. A." as the sole beneficiary; that the "UNITED STATES GOVERNMENT, U. S. A.", to-wit, the UNITED STATES OF AMERICA, is not authorized by statute or otherwise to take under a will executed in the State of California by a resident of the State of California; that the said will of deceased was executed in the State of California by deceased while he was a resident of the State of California; that the said

21 "UNITED STATES GOVERNMENT, U. S. A.", to-wit, the UNITED STATES OF AMERICA, is not a state, county, municipal corporation, or natural person capable by law of taking the property of the estate of deceased; is not an unincorporated religious, benevolent or fraternal society or association or lodge or branch thereof; is not a corporation formed for religious, scientific, literary or solely educational or hospital or sanitorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes, within the meaning of Section 27

of the Probate Code of the State of California; that the "UNITED STATES GOVERNMENT, U. S. A.", to-wit, the UNITED STATES OF AMERICA, is not authorized to take by will under the provisions of Section 27, Probate Code of the State of California or under any other statute or law of the State of California; that said gift, devise and bequest by said will of said deceased of all of the estate of said deceased to "THE UNITED STATES GOVERNMENT, U. S. A.", to-wit, the UNITED STATES OF AMERICA, is a void gift, devise and bequest, and that the deceased died intestate as to all of his said estate, and that the heirs at law of deceased surviving him at the time of his death are entitled to succeed to the entire estate of deceased according to the laws of succession of the State of California; that the petitioner is informed and believes, and on said information and belief alleges that the following named persons are the heirs at law
22 of deceased surviving him at the time of his death, and are entitled to succeed to the entire estate of deceased in the following proportions, to-wit:

JOHN W. BURNISON, brother	one-eighth (1/8)
JOE BURNISON, brother	one-eighth (1/8)
JULIUS BURNISON, brother	one-eighth (1/8)
DENA IRVINE, sister	one-eighth (1/8)
GENEVA PETERSON (only child of Fred Burnison, predeceased brother of deceased)	one-eighth (1/8)
ELMA SAYLOR (only child of Fena Lindstrum, predeceased sister of deceased)	one-eighth (1/8)

The following named children of Hulda Ingemanson predeceased sister of deceased:

EDNA YOUNG	one fifty-sixth (1/56)
LEONARD INGEMANSON	one fifty-sixth (1/56)
BLENDA RITCHERD	one fifty-sixth (1/56)
LINNEA TURNER	one fifty-sixth (1/56)
GLEN INGEMANSON	one fifty-sixth (1/56)
LESLIE INGEMANSON	one fifty-sixth (1/56)
EARLINE FURGESON	one fifty-sixth (1/56)

The following named children of Alma Vann, predeceased sister of deceased:

ELSIE HUDSON	one thirty-second (1/32)
MILDRED BOYDSTON	one thirty-second (1/32)
VIVIAN STWALLEY	one thirty-second (1/32)
23 MANARD VANN	one thirty-second (1/32)

WHEREFORE, your petitioner prays that a time be appointed for hearing this application, and that after pro-

ceedings to that end duly had and taken, the court make an order distributing to the said heirs at law of deceased, respectively, the whole of the portion of said estate to which each heir at law is entitled, after payment of all proper claims, taxes and costs and expenses of administration; and for such other and further orders as may seem to the court to be meet and just.

JOE BURNISON /s
Petitioner

HARRY N. GROVER /s
EVERETT H. ROAN /s
Attorneys for Petitioner

Duly sworn to by Joe Burnison.
Jurat omitted in printing. (All in italics.)

24 RECEIPT OF COPY of the within petition acknowledged this 18th day of Oct., 1946.

HENRY F. BOYEN /s
Attorney for Phil C. Katz, Administrator
FRANK J. HENNESSY /s
Attorney for United States of America

In Superior Court of City and County of San Francisco
(File Endorsement Omitted)

Proof of Posting on Petition for Partial Distribution—filed Oct. 21, 1946

NOTICE IS HEREBY GIVEN THAT JOE BURNISON on his own behalf and on behalf of the other heirs of GUST BURNISON, also known as GUSTAV BURNISON, deceased, having filed in this Court his Petition for Partial Distribution, the hearing of the same has been fixed by the Clerk of said Court for November 15, 1946, at 10 o'clock A. M. of said day, at the Courtroom of Department No. 9, Probate, thereof, at the
25 City Hall, 400 Van Ness Avenue, San Francisco, State of California, and all persons interested in the said estate are notified then and there to appear and show cause, if any they have, why the said petition should not be granted. For further particulars, reference is hereby made to said petition on file in my office.

Dated: OCT. 18, 1946.

H. A. VAN DER ZEE, *Clerk*
By LUTHER DOBSON, *Deputy Clerk*

State of California
City and County of San Francisco } ss.:

J. P. WALL, being duly sworn, deposes and says: I am, and at the time of posting the above notice was, a citizen of the United States over eighteen years of age. I am not interested in the matter of the above proceeding, and in no way disqualified from testifying therein. On October 18, 1946, I posted a notice of which the above is a true copy at the City Hall in the City and County of San Francisco, being the place at which the above entitled Court is held.

J. P. WALL /s

Subscribed and sworn to before me
OCT. 18, 1946.
P. L. CLAVERE,
Deputy County Clerk.

26 In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Special Notice of Filing Petition for Partial Distribution—Filed Oct. 24, 1946

To the United States of America and Frank J. Hennessy, its attorney:

In accordance with your request therefor, dated April 2, 1946, you and each of you will please take notice, and you and each of you are hereby notified, that JOE BURNISON, on his own behalf, and on behalf of the other heirs at law of the above named deceased, filed herewith in the above entitled court his Petition for Partial Distribution in the above entitled estate.

You and each of you will please take notice, and you and each of you are hereby notified, that said Petition for Partial Distribution will be presented to the above entitled court for its consideration on Friday, the 15th day of November, 1946, at 10 o'clock A. M. of said day, or as soon thereafter as said matter can be heard, at the court room of said court, Department 9, at the City Hall, 400 Van Ness Avenue, San Francisco, State of California.

Dated: This 24th day of October, 1946.

HARRY N. GROVER /s
EVERETT H. ROAN /s

Receipt of copy of the within Notice acknowledged,
27 this 24th day of October, 1946.

FRANK J. HENNESSY /s
Attorney for the United States

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Citation and Affidavit of Service—Filed Nov. 7, 1946.

THE PEOPLE OF THE STATE OF CALIFORNIA, to

PHIL C. KATZ, Public Administrator of the City and County of San Francisco, State of California, administrator with the will annexed of the estate of the above named deceased:

YOU ARE HEREBY cited to be and appear in our Superior Court of the State of California in and for the City and County of San Francisco, at the Court Room of Department No. 9, Probate, thereof, at the City Hall, 400 Van Ness Avenue, in said City and County of San Francisco, on November 15, 1946, at 10 o'clock A. M. of that day, then and there to show cause if any you have, why petitioner's Petition for Partial Distribution should not be granted.

BY ORDER of said Superior Court, at the City and County of San Francisco

(SEAL) Dated OCT 18, 1946

ATTEST my hand and the seal of said Court, the day and year last above written.

28

H. A. VAN DER ZEE, *Clerk*
By LUTHER DOBSON /s
Deputy Clerk.

State of California
City and County of San Francisco } ss.:

HARRY N. GROVER, being duly sworn, says that he is, and was at the time of the service of the citation herein referred to, a citizen of the United States, over the age of eighteen years; that he is not interested in the within-named matter, and is competent to be a witness upon the hearing of the within proceedings; that he served the within Citation by showing the said within original to each of the following named persons named therein and delivering a true copy thereof to each of the said persons personally, as follows:

Names of Persons Served	Place Where Served	Time of Service
PHIL KATZ, Pub. Adm., San Francisco,	San Francisco, Calif.	Oct. 31, 1946

HARRY N. GROVER /s

Subscribed and sworn to before me this 6th day of November, A. D., 1946

(SEAL) GUSTAVE RICHMAN
Notary Public in and for the City and County of San Francisco, State of California.

29 In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Objections of the United States of America to Granting Petition for Partial Distribution Filed by Joe Burnison, et al.—Filed Jan. 20, 1947

The United States of America, by Frank J. Hennessy, United States Attorney for the Northern District of California, at the direction and under the authority of the Attorney General and the Solicitor General of the United States of America, appears herein as a person interested in the above entitled estate, and hereby resists and objects to the granting of the Petition for Partial Distribution filed herein by petitioner, Joe Burnison, on his own behalf, as an alleged heir at law of the above named deceased, and on behalf of John W. Burnison, Geneva Peterson, Edna Young, Glen Ingemanson, Leslie Ingemanson, Earline Furgeson, Elsie Hudson, Julius Burnison, Elma Saylor, Mildred Boydston, Leonard Ingemanson, Blenda Ritcherd, Vivian Stwalley, Dena Irvine, Linnea Turner and Manard Vann, as alleged heirs at law of said deceased, for these reasons:

I

That no testamentary disposition whatever is made to said Joe Burnison, or to any of the above named alleged heirs at law, in the will of said deceased, admitted to probate by the above entitled Court on May 7, 1946.

30 II

That under the provisions of said will the "United States Government, U. S. A.", that is, the United States of America, is named as the sole beneficiary, and is thereby entitled to take and have distributed to it the whole of the estate of said decedent.

III

That the United States of America is a person or corporation authorized to take by will pursuant to Section 27 of the Probate Code of California.

WHEREFORE, the United States of America prays that said Petition for Partial Distribution be denied; and that

distribution of said estate be made wholly and only to the United States of America.

Dated: January 20, 1947.

THE UNITED STATES OF AMERICA
By FRANK J. HENNESSY /s
United States Attorney
R. B. McMILLAN /s
Assistant United States Attorney
Attorneys for said United States of America

31 In Superior Court of City and County of San Francisco

Order Sustaining Objections and Denying Partial Distribution Heretofore Submitted

Petition of JOE BURNISON for Partial Distribution and objections.

OBJECTIONS SUSTAINED, PETITION DENIED.

M. B. order JUN 20 1947

G. J. ROMAINE /s
Deputy County Clerk

In Superior Court of City and County of San Francisco
(File Endorsement Omitted)

Notice of Appeal From Judgment and Order Denying Petition for Partial Distribution and Sustaining Objections to said Petition—Filed June 30, 1947

To the Clerk of the above entitled Court:

YOU WILL PLEASE TAKE NOTICE, that JOE BURNISON, petitioner in the above entitled proceeding for partial distribution of the above estate, hereby appeals to the Supreme Court of the State of California from the order made in said Superior Court on the 20th day of June, 1947, denying his Petition for Partial Distribution of said estate and sustaining written Objections to the granting of said petition filed by the United States of America, and
32 from the whole thereof, which said order was entered in the Minutes of said Superior Court on the 20th day of June, 1947.

Dated: This 28th day of June, 1947

HARRY N. GROVER /s
EVERETT H. ROAN /s
Attorneys for Joe Burnison
Petitioner for Partial Distribution

In Superior Court of City and County of San Francisco

(File Endorsement Omitted)

Notice to Clerk to Prepare Transcript on Appeal—Filed July 9, 1947

To the Clerk of the above entitled Court:

YOU WILL PLEASE TAKE NOTICE, that JOE BURNISON, petitioner for partial distribution in the above entitled proceeding, has appealed to the Supreme Court of the State of California from that certain order in the above entitled court made and entered on the 20th day of June, 1947, denying petitioner's Petition for Partial Distribution and sustain Written Objections to the granting of said petition filed by the United States of America, and said petitioner hereby requests that a Clerk's Transcript including the judgment roll in said proceeding, the will of the deceased, notice of appeal, the Clerk's minutes, said judgment roll to include all of the record in such proceed-
33 ing, including letters of administration with the will annexed, all petitions, all notices and affidavits of posting notices, all citations, written objections, orders, Inventory and Appraisement, claims of creditors, and also a Reporter's Transcript of testimony offered or taken, evidence ordered or received, and all rulings, acts or statements of the Court, and also all objections and exceptions of counsel and all matters to which the same relate, be made up and prepared.

Dated: This 9th day of July, 1947.

EVERETT H. ROAN /s
HARRY N. GROVER /s
Attorneys for Petitioner

Receipt of a copy of this instrument is hereby acknowledged this 9th day of July, 1947.

FRANK J. HENNESSY /s
United States Attorney

Receipt of a copy of this instrument is hereby acknowledged this 9th day of July, 1947.

HENRY F. BOYEN /s

34 *Clerk's Certificate*

State of California }
City and County of San Francisco } ss.:

No. 102412

Notices of completion of the Clerk's Transcript on Appeal of the within action having been mailed to the attorneys representing the appellant and the respondent, and no request for correction of said transcript on appeal having been filed, and the time for said filing having expired:

Pursuant to Rule 8 (a) of the Rules on Appeal, I HEREBY CERTIFY the foregoing record, consisting of 33 pages, to be a full, true and correct transcript on appeal.

Dated this 5th day of September, 1947.

ROBERT MUNSON
County Clerk and
Clerk of the Superior Court of the
State of California, in and for the
City and County of San Francisco

By s/ LUTHER DOBSON
Deputy Clerk

35 In the Superior Court of City and
County of San Francisco

Department No. 9, Probate

HON. T. I. FITZPATRICK *Judge Presiding*

No. 102412

In the Matter of the Estate
of
GUST BURNISON,
also called
GUSTAV BURNISON,
Deceased.

Reporter's Transcript—Filed Aug. 15, 1947

April 11, 1947

APPEARANCES:

For Petitioner JOE BURNISON:

HARRY N. GROVER, Esq. and
EVERETT H. ROAN, Esq., by
HARRY N. GROVER, Esq.

For PHIL C. KATZ as Public Administrator of the City and County of San Francisco:

HENRY F. BOYEN, Esq., by
FRANK FONTES, Esq.

For the UNITED STATES OF AMERICA:

FRANK J. HENNESSY, Esq., by
ROBERT B. MCMILLAN, Esq.

36 FRIDAY, APRIL 11, 1947
11 o'clock, A. M.

Colloquy

Mr. GROVER: This matter involves a bequest to the United States Government under the will of the deceased. Mr. Roan and myself represent those heirs entitled to succeed under the laws of succession. A petition has been filed, and there has been a memorandum and objection filed on behalf of the legatee. Mr. McMillan is representing the United States Attorney's Office, and Mr. Fontes is here representing the Public Administrator, the proponent of the will.

From my conversations with Mr. McMillan and Mr. Fontes, there is no question raised insofar as the right of the named parties in the petition to succeed under the laws of succession. The sole question is whether or not the will, as it reads, is void under the provisions of Section 27 of the Probate Code. I have a memorandum of points and authorities which I would appreciate your Honor permitting me to file, and Mr. McMillan, I believe, will do the same. It is our contention—

The COURT: (Interrupting) Is this the case that Mr. McMillan was in before, and we were awaiting an Appellate Court decision from Los Angeles County? We have that under submission in another case.

Mr. MCMILLAN: Yes, a similar question is involved; that is the Estate of Hendrix, and the District Court of
37 Appeal, on January 16, 1947, decided the case, and I was told by the Clerk of the Supreme Court this morning that the time for filing a petition for rehearing has expired; the remittitur went down on March 18. I could read one page from that decision that is absolutely conclusive in this case.

The COURT: That the Government could take?

Mr. MCMILLAN: That the United States could take. In this case it was a bequest to the Veterans' Administration,

and they contended that, being an agency of the United States Government, they couldn't take under 27 Probate Code. Not only does that decision hold that the agencies may take, but under that Section that the United States Government is such a person and corporation as may take under that Section. There is no obscurity in the language whatsoever. (Reading from the case cited.)

The COURT: What position do you take?

Mr. GROVER: We are taking the position that a bequest to the United States Government, without any other named beneficiary such as the Veterans' Administration, or some purpose designated in the will for which the money is to be used, is without Section 27; that the United States Government—

The COURT: (Interrupting) Are you claiming that the issue is not the same in the case just recited?

Mr. GROVER: No, it is not; there the Veterans' Administration was involved, and the turning point of the
38 case was the Veterans' Administration.

The COURT: Do you have any cases that hold to the contrary, where this question was determined in any other manner—this question of the right of the Veterans' Administration or the Government to take under the will—which involves Section 27—which you claim are inconsistent with Mr. McMillan's contention when he is standing on this decision that came down from the Appellate Court in which he claims this contention was determined—have you any cases to the contrary?

Mr. GROVER: We have one, the Estate of Loring, decided by a court of equal dignity, and which later went to the Supreme Court, in which the question of Section 27 is not discussed because there were certain technical faults on behalf of the attorneys in handling the case in the lower court, so that they did not properly present it.

The COURT: That wouldn't have very much weight under the question that I am putting to you.

Mr. GROVER: Well, I think it would, for this reason: The Estate of Loring is decided by the District Court of Appeals, and offers this support to our contentions—

The COURT: (Interrupting) You know I have decided this question two or three times.

Mr. GROVER: I don't think you ever had one where the will read as this one does.

The COURT: The case that involved the young man
39 from Milton Harris's office—

Mr. McMillan: That is the Estate of Jennie Carroll—but the case that counsel refers to is entirely beside the point here.

(Discussion off the record.)

Mr. Grover: The application of Section 27—

Mr. McMillan: (Interrupting) May I read just one paragraph?

The Court: We have discussed this matter, and I am pretty well familiar with it, although I have not made up my mind finally—although I would say I have 98%—there may be 2% left; if you want to write a letter or memorandum in answer to Mr. McMillan, in which you claim that this decision, handed down by the District Court of Appeals, and in which there was no petition for rehearing granted, so that it would become final, that the facts are not the same, I think in letter form—you could put it in letter form, and then we will submit it.

Mr. Grover: I have a memorandum which I will file now, and I will write a letter in response to your Honor's suggestion.

(Thereupon the matter was submitted.)

40 *Certificate of Trial Judge*

State of California)
City and County of San Francisco) ss.:

I, T. I. Fitzpatrick, Judge of the Superior Court of the State of California, in and for the City and County of San Francisco, the Judge who presided at the trial of the above entitled action, do hereby certify that the foregoing reporter's transcript, pages 1 to 5, inclusive, has been properly filed, and within the proper time, and presented to me for my approval; that I have examined the same and that the same is a full, true and correct transcript of the proceedings had and testimony taken at said trial, all the instructions, acts, and statements of the Court, and all objections and exceptions of counsel, and all matters to which the same relate.

I Therefore Hereby Certify that the same is true and correct, and that the same, as hereby settled and allowed, be and become part of the Judgment Roll in said action to be considered on Appeal in lieu of any Bill of Exceptions.

Dated: San Francisco, California, this day of , 1947.

.....
Judge of the Superior Court

41 *Reporter's Certificate*

State of California
City and County of San Francisco } ss.:

I, PAUL E. SPRINGER, Official Reporter of the Superior Court of the State of California, in and for the City and County of San Francisco, qualified and acting in Department 9 thereof, do hereby certify:

That the foregoing pages, numbered 1 to 5, inclusive, constitute a full, true and correct transcript of my shorthand notes, taken as such official reporter, of the testimony offered and taken, and all rulings, acts, statements, and instructions of the Court; also all objections or exceptions of counsel, and all matters to which the same relate, in the trial in the Matter of the Estate of Gust Burnison, No. 102412, tried before Honorable T. I. FITZPATRICK, Judge, on the 11th day of April, 1947.

Dated: Sep. 5, 1947.

s/ PAUL E. SPRINGER
Official Reporter

42 In the Supreme Court of California

(File Endorsement Omitted)

48 *Statement of Question Involved*

Is a bequest to the United States of America invalid because, as contended by appellant, the United States of America is not authorized to take by will under Section 27 of the Probate Code of the State of California?

49 In the Supreme Court of California

In the Matter of the Estate of
GUST BURNISON,
also called GUSTAV BURNISON, Deceased.

JOE BURNISON,
APPELLANT,
PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, and THE UNITED STATES OF AMERICA,
RESPONDENTS.

Petition of Respondent, The United States of America, for a Hearing by the Supreme Court,

After Decision by the District Court of Appeal, State of California, First Appellate District, Division Two, and Numbered Therein 1 Civil No. 13,617.

City and County of San Francisco.
Honorable T. I. Fitzpatrick, Judge.

Filed Sept. 24, 1948

50 *To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:*

The respondent, United States of America, respectfully requests a hearing by this Honorable Court of the above entitled cause decided by the District Court of Appeal, First Appellate District, Division Two, on August 18, 1948; 87 A.C.A. 310; a copy of the opinion appearing in the Appendix to this Petition.

The decedent, a resident of San Francisco, left a will bequeathing all his property to "the United States Government, U.S.A." (Clerk's Tr. p. 2.) He left personal property appraised at $22,668.70 (Clerk's Tr. pp. 9, 17). His heirs at law are three brothers, one sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this State (Clerk's Tr. pp. 18, 20).

The Superior Court, City and County of San Francisco, following an interpretation of the law that has heretofore been applied by the Courts in this State in numerous cases, upheld by the bequest to the United States (Clerk's Tr.

p. 31). The District Court of Appeal, reversing the order of the Superior Court, held that the United States cannot take by will under Section 27 of the Probate Code of California.

This decision is wholly unwarranted under the State law or under the Federal statutes and the practice
51 that has long prevailed. It is clearly in conflict with the decision in *Estate of Hendrix*, 77 A.C.A. 719 (District Court of Appeal, Second Appellate District), and is at variance with the interpretation heretofore followed by the Superior Courts of the State. We think this is clearly set forth in the brief of the Government in the *Estate of Hendrix*, a copy thereof being annexed to its brief in the Estate of Burnison. We submit therefore that this petition for hearing should be granted.

Statutes Involved

State statute construed by the Court is Section 27 of the Probate Code of California, which reads as follows:

> Sec. 27. Who may take by will. A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute.

Federal statutes and constitutional provisions bearing upon the matter are set forth in the argument.

52

Summary of Argument

I.

The Federal Constitution and the statute creating the Treasury Department authorize the acquisition of property by will by the United States. Under applicable decisions of the Supreme Court of the United States and of the Supreme Court of California, the Federal law must be given effect.

II.

The United States is a corporation within the meaning of Section 27 of the Probate Code, and the bequest is "ex-

pressly authorized by statute," within the meaning of the words as used in Section 27—those words not contemplating exclusively an act of the legislature of California.

Furthermore, the word "State", as used in Section 27, may be interpreted as including the United States and should be given this interpretation if necessary in order to avoid an undesirable result not intended by the legislature.

If it be assumed, however, that the United States is not a "corporation", and also that it is not a "State", under Section 27, then that section is merely silent on the subject, and under applicable decisions we must look to the Federal law to determine the right of the United States to acquire the property. That law, as we have shown above, authorizes the acquisition.

53

III.

The view adopted by the Court below attributes to the State statute a discriminatory effect, and denies to the United States a right existing under the Federal Constitution and a Federal statute. Such a decision is reversible on constitutional grounds. And, under a familiar principle, these arguments are additional reasons in support of a construction of the State law as validating the bequest.

ARGUMENT

I.

THE FEDERAL LAW AUTHORIZES BEQUESTS TO THE UNITED STATES, AND THE FEDERAL LAW MUST BE READ TOGETHER WITH THE STATE LAW WHEN DETERMINING THE VALIDITY OF THIS BEQUEST.

After the adoption of the Federal Constitution questions arose regarding the power of the Federal Government to receive voluntary bequests and devises and to do other things not specifically enumerated in the Constitution. The view which has prevailed concerning bequests and devises is thus set forth in *Dickson v. United States*, 125 Mass. 311, 313:

> In England, bequests for the benefit of the country, or for the payment of the national debt, have always been held valid. * * *
>
> The property or money, when received by the United States, must doubtless be applied to public purposes authorized by the Constitution and laws. But the

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> right to receive money or property, voluntarily contributed, is not a separate power, but a capacity be-

longing to the United States as a body politic and incident to the right of sovereignty, and to which may be applied the words used by eminent judges in speaking of the implied capacity of the United States to enter into contracts. * * *

To hold that the supreme government of the country, vested by the Constitution with the power to levy and collect taxes and duties to pay the debts and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and capable of making contracts and of accepting security for debts, and, in case of necessity of taking private property by the right of eminent domain, has no capacity to receive a voluntary devise or bequest, is a conclusion that nothing short of an express statute or a binding judicial decision could justify us in adopting.

The Federal statutes, like the Constitution, have not spelled out in minute detail each and every duty enjoined upon or act authorized to be performed by particular departments and agencies of the Government. Much has necessarily been left to implication.

The applicable principle is set forth in *Neilson v. Lagow, et al.*, 12 How. (U.S.) 98, 107, which upheld the authority of the Secretary of the Treasury to acquire "the legal title to land, without express legislative authority, when it is taken by way of security for a debt."

55 The Court stated in part:

It is the duty of the Secretary of the Treasury to superintend the collection of the revenue, and of the Comptroller of the Treasury to provide for the regular and punctual payment of all moneys which may be collected, and to direct prosecutions for all debts which may be due to the United States. 1 Stat. at Large, 65, 66. To deny to them the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, we consider settled by the cases of *Dugan's Ex'rs. v. United States*, 3 Wheat. 172; *United States v. Tingey*, 5 Pet. 117; *United States v. Bradley*, 10 Pet. 343; *United States v. Linn*, 15 Pet. 290.

These cases decide, that the United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts and take bonds, by way of security, in cases within the sphere of their constitutional power, and appropriate to the just exercise of those powers, through the instrumentality of the proper department, when not prohibited by law, although not required to do so by any legislative act; and we think this same power extends to and includes taking security upon property for a debt already due.

56 As stated in *Ex Parte Yarbrough*, 110 U.S. 651, 658, it is a "doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed."

Among the implied powers long exercised by the Treasury Department is the acceptance of voluntary payments, both *inter vivos* and testamentary. Such contributions have flowed into the Treasury since the earliest days of the Government. Some are intended as in satisfaction of obligations; but it is not always known whether or not this is true in particular cases. In a recent case, for example, inquiries disclosed the fact that an unconditional and unexplained bequest of certain securities was intended as reimbursement to the Government for benefits obtained by the decedent through a misrepresentation. *Estate of Moore*, Circuit Court, Halifax County, Virginia.

The Congress has been well aware of this practice and of the interpretation thus placed upon the statutes creating the Treasury Department and, not only has acquiesced therein, but has by legislation evidenced unmistakable approval. A recent example is the act of April 3, 1945, c. 51, 59 Stat. 48 (31 U.S.C. 757e). This statute does not in express terms authorize Government bonds to be bequeathed to the United States, nor does any other act of Con-

57 gress.[1] However, it provides what the Treasurer

[1] Certain statutes authorizing bequests to particular agencies are broad enough to cover bequests of Government bonds. These are discussed hereinafter. A provision in the act of April 3, 1945, which should be noted in this connection, directs that the Treasurer, after redeeming the bonds and paying any gift or inheritance tax due thereon, shall deposit the balance in the Treasury "as miscellaneous receipts or as otherwise authorized by law". A bequest to the United States without limitation as to use would go into "miscellaneous receipts". A bequest to or for the use of a particular agency having a statute such as first mentioned in this footnote would go into a special fund "as * * * authorized by law".

of the United States shall do when such obligations are bequeathed to the United States. Another such example is 26 U.S.C. 812, providing for the deduction of bequests to the United States when computing Federal inheritance taxes.

Gifts and bequests to the United States without limitation as to use are, in general, deposited in "miscellaneous receipts", subject to appropriation by the Congress for the general expenses of the Government. If, however, the gift is conditional, or if the Congress desires that it be used otherwise than for general expenses, special legislation may be enacted. The following are illustrations: Act of August 10, 1846, c. 178, 9 Stat. 102, creating the Smithsonian Institution to administer the funds left to the United States under the will of James Smithson, of London. Joint Resolution of June 22, 1938, c. 595, 52 Stat. 943, authorizing the executor of the estate of the late Justice Oliver Wendell Holmes to convey the Holmes residence to the United States, and providing for a committee to make recommendations to the Congress concerning the use to be made of the money and other property bequeathed. Act of July 15, 1935, c. 381, 49 Stat. 481, providing for the disposition of certain real and personal property left to the Secretary of
58 the Navy for the benefit of the hospital fund, United States Navy, under the will of the late Lieutenant Commander Paul E. McDonnold, of Los Angeles, California.

In order to provide for the administration of gifts and bequests conditioned or intended for particular uses, and also sometimes with apparent purpose to encourage the making of such gifts and bequests, the Congress has enacted some statutes applicable to particular agencies. Thus, the act of March 3, 1865, c. 91, 13 Stat. 509, as amended by the act of January 23, 1873, c. 51, 17 Stat. 417, created a corporation, the National Home for Disabled Volunteer Soldiers, with express authority to receive donations (construed as including bequests). The powers and property of this corporation were later transferred by act of Congress to the United States Veterans' Administration. See *Estate of Hendrix*, 77 A.C.A. 719.

Another example is the act of March 3, 1925, c. 423, 43 Stat. 1107 (2 U.S.C. 154 *et seq.*) creating the Library of Congress Trust Fund Board with authority "to accept, receive, hold, and administer such gifts, bequests, or devises of property * * * as may be approved by the Board and by

the Joint Committee [of Congress] on the Library." The Librarian of Congress had always accepted gifts and bequests for the library under authority implied from, but not expressly stated in, the statute creating the library; and some gifts and bequests (e. g., books, objects of art, etc.) are still accepted under such implied authority by the librarian, not the Trust Fund Board.

59 Another form of legislation to be noted in this connection appears in 31 U.S.C. 725s, setting up certain trust funds in the Treasury and then providing for the setting up of other trust funds in analogous cases.

No express legislation appears to have resulted from any doubt of the implied authority of administrative officers to accept and administer unconditional bequests such as involved in this case. Congressional acquiescence in, and approval of, the principle that the Treasury Department has the implied authority to accept such bequests of personal property is further illustrated by the case of *United States v. Moore*, 197 Ark. 664, and the act of Congress approved May 22, 1939, c. 143, 53 Stat. 753. Thomas A. Beck and Lizzie Beck, his wife, by appropriate wills and codicils, had left to the United States all their property "unused or unexpended" at the death of the survivor. The estate consisted of both real and personal property and a question was raised regarding the authority of the Secretary of the Treasury to accept the devise of the real property because of the provision in 41 U.S.C. that "no land shall be purchased on account of the United States except under a law authorizing such purchase." In order to remove any such doubt the Congress passed the act of May 22, 1939, authorizing and directing the Secretary to accept and dispose of the real estate. *The point to be noted is that no doubt was thought to exist concerning, and therefore*

60 *no need to implement, the implied authority of the Secretary to accept the bequest of personal property.*

It is simply an inescapable truism, so far as Federal law is concerned, that unconditional bequests such as involved in this case can be made and accepted, and for many years have been made and accepted, by the Treasury Department in the exercise of authority implied from the Federal Constitution and the statute creating that department under the principles set forth in *Dickson v. United States* and *Neilson v. Lagow, et al., supra.* It is indicated in those cases that the power of the United States to acquire property by will and to take title to land by way of security for a debt, respectively, are implied from the Constitution.

That the authority of a *particular department* to exercise these powers depends upon, and may be implied from, the statute creating the department is also clearly indicated in *Neilson v. Lagow, et al.* The statute here applicable is the statute creating the Treasury Department, the same statute referred to by the Supreme Court in *Neilson v. Lagow, et al.*—subsequently amended (5 U.S.C. 241 *et seq.*), but not with effect upon the question here involved.

That the Federal law must be read together with the State law is indicated by the cases dealing with the provision in the statute relating to the National Home for Disabled Volunteer Soldiers, *supra*, requiring agreements by applicants for admission to the home " that all personal property of said applicant shall, upon his death * * * at
61 once pass to and vest in said Board of Managers"—
apparently involving in large part the precise legal questions herein considered. That section of the statute and the contracts executed thereunder have been upheld as valid. *United States v. Stevens*, 302 U.S. 623, 626-628; *National Home v. Wood*, 299 U.S. 211, 215; *Mauck v. United State* (C.C.A., 9th Circuit), 94 F. (2d) 745, 746. See also: *Estate of Lindquist*, 25 Cal. (2d) 697, 705; cert. denied 325 U.S. 869; *Estate of Walker*, 25 Cal. (2d) 719; cert. denied 325 U.S. 869. The following is quoted from *United States v. Stevens:*

> The Court of Appeals was of the opinion that the act of Congress authorizing the contract was void as an interference with the reserved rights of the state of the veteran's legal domicile when he died (Massachusetts) in that "it was at most but an attempt to make a future testamentary disposition of McGovern's property, when such a disposition could only be effected by will."
>
> This contract, however, is valid under the applicable state law. The Supreme Court of Massachusetts in 1931 in the case of *Hale v. Wilmarth*, 274 Mass. 186, 189; 174 N.E. 232, said, "The statute of wills, * * * does not prevent an owner of property from stipulating by contract for the disposition of his property at the time of his death." * * *
>
> In passing the act of June, 1910, Congress merely directed the terms and conditions under which veterans, consistently with state law, can obtain admittance to Homes built, maintained and operated by the government for the benefit of veterans. * * *

62 This contract is valid and enforceable, and since no claim was made by heirs or legatees within five years after his death, the veteran's personal property passed to the Home for the benefit of its inmates.

Such contracts do not of their own force, under State law, operate as testamentary dispositions of, or pass title to, the affected property. That this is true in Massachusetts, where the question in *United States v. Stevens*, arose, clearly appears from the cases cited in the Supreme Court's opinion. *Murphy v. Murphy*, 217 Mass. 233, 236; *Hale v. Wilmarth*, 274 Mass. 186, 189. The situation is the same in California. *Mauck v. United States, supra*, cited in *Estate of Lindquist, supra*. The import of the decision in the *Stevens* case appears to be that, since the State permitted its citizens to make contracts that could be enforced in proceedings against their estates after death, there could be no valid objection to the Federal statute requiring the execution of such contracts upon admission to the National Home and attributing to them an effect different only in form, rather than in substance, from the effect which they would have under State law.

It would seem incongruous that a contract that property shall pass at death is valid and accomplishes the intended result (as held in *United States v. Stevens* and other cases, *supra*), that an undertaking to make a will with such effect is enforceable (which was the basis of the con-
63 clusion in the *Stevens* case), but that if the will is actually made it is inoperative. The reasoning and the basis of the conclusion in *United States v. Stevens* appear to require that the will be given effect notwithstanding doubt (if any really exists) whether the result could be accomplished in the precise manner under the State law alone.

Bequests of money and other personal property have been made and awarded to the United States in many cases, both in this country and aboard. (The cases are largely unreported.) Aside from the recent litigation in California, so far as counsel are aware no court, anywhere, has questioned the right of the United States to take personal property left to it by will. Aside from the *Fox* case[2] this statement is true also regarding devises of real property. Recent and pending California cases in which the question has been raised are discussed in Part II hereof.

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[2] *In the Matter of Will of Fox*, 52 N. Y. 530, affirmed in *United States v. Fox*, 94 U. S. 315, concerned a devise of land and is discussed and distinguished in Part III hereof.

II.

THE STATE LAW, PROPERLY CONSTRUED, IMPOSES NO OBSTACLE TO THE ACQUISITION OF THIS PROPERTY BY THE UNITED STATES.

In *Estate of Hendrix*, 77 A.C.A. 719, the District Court of Appeal, Second Appellate District, upheld a bequest to the United States Veterans' Administration for the benefit of disabled veterans of the World War. The Court concluded:

> * * * It is clear to us that there was no error in holding that the bequest to the agency was, in effect, a bequest to the parent, the United States of America.
>
> We entertain no doubt that the United States Government is a corporation within the meaning of section 27 of the Probate Code. * * *
>
> The bequest to the Veterans' Administration was a bequest to the United States Government, a corporation; the government was expressly authorized by statute to take donations of property through what is now the Veterans' Administration, and the bequest is valid. * * *

The District Court of Appeal in this case attempts to distinguish *Estate of Hendrix*, points out that the bequest here involved "is not to any agency of the Government, incorporated or unincorporated, or to the Government as trustee, or for any particular purpose or use," that the question is simply whether the United States *eo nomine* can take property by will under Section 27 of the California Probate Code, and answers that question in the negative.

We think the attempted distinction is without merit. There is no difference for the purpose here involved between the United States and one of its agencies. Cf. *United States Grain Corp. v. Phillips*, 261 U. S. 106, 113-114. There cannot be attributed to the legislature an intention that the validity of bequests should depend upon the precise status (e. g. as a corporation or *quasi* corporation) of the Federal agency administering them, or upon whether the bequests are made to the agency itself or to the United States. The United States acts only through its agencies. The Court does not discuss Section 13,841 of the California Revenue and Taxation Code, which exempts "*property transferred to * * * The United States*" from California inheritance taxes.

Section 27 of the Probate Code can reasonably be construed as authorizing bequests to the United States *eo nomine*. The term "corporation," as used therein, includes a public corporation. *Estate of Bulmer*, 59 Cal. 131; *City of Pasadena v. Stimson*, 91 Cal. 238, 248; *Estate of Coleman*,

167 Cal. 212, 216. This appears to have been clearly so under the language of Section 1275 of the Civil Code, which is copied below:

> Sec. 1275. Who may take by will. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that *corporations other than counties, municipal corporations,* and corporations formed for scientific, literary, or solely educational or hospital purposes, or primarily for the public preservation of forests and natural scenery, cannot take under a will, unless expressly authorized by a statute * * *. [Italics supplied.]

Section 27 of the Probate Code is based upon Section 1275 of the Civil Code. *Estate of Yule*, 57 Cal. App. (2d) 652, 655. No reason appears for implying that the term "corporation" is now to be more narrowly construed
66 so as to deny to public corporations under Section 27 a right which they had under Section 1275.

That the United States is a corporation is without doubt. *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 154; *Respublica v. Sweers*, 1 Dall, 41, 44. That the term "corporation" when used in a statute may appropriately include the United States is also clear. *Ohio v. Helvering*, 292 U. S. 360, 370; *Georgia v. Evans*, 316 U. S. 159, 161.

The provision in Section 27 of the Probate Code that "no other corporation can take under a will, *unless expressly authorized by statute.*" [Italics supplied] does not contemplate exclusively a statute of California. That conclusion is required here in order to give effect to the probable intent of the legislature. And this doubly supports the argument because the precedents indicate that the view advocated is the correct one even aside from the factors that give it added weight in this case.

In re Hauge's Estate, 92 Mont. 36, 39, 41, dealt with a statute comparable to that of California: It read: "A testamentary disposition may be made to any person capable of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take under a will, *unless expressly authorized by statute.*" [Italics supplied.] The Court held that the italicized words included the corporation law of another State. It said:

67 The statute (Sec. 6977) contains no special prohibition against foreign corporations. If a *Montana corporation is expressly authorized to take under will*

a foreign corporation of the same or a similar class, authorized by its charter to take, may do so. [Italics supplied.]

Mr. Fletcher says: "A foreign corporation may take and hold personal property, if it is authorized to do so by its charter and it is not contrary to the public policy of the state for it to take such property. Personal property follows the *locus* of the owner, and there is no reason why it should be a matter of concern to the state that the personal property should pass to foreign corporations any more than to individuals residing out of the state. Consequently it is well said that a bequest of personal property or money to a foreign corporation is valid, if the corporation has the capacity to take the bequest and the testator is not prohibited by the laws of the state in which he is domiciled from making such bequests." (8 Fletcher, Cyc. Corp., sec. 5870.)

Another term in Section 27 of the Probate Code which may be interpreted as including the United States, if necessary, in order to avoid an undesirable result not intended by the legislature, is the word "State." Although we find no pertinent California case, the word has been declared to include the United States in two cases arising under statutes of other States (relating to matters other than wills). *Terry v. Olcott*, 4 Conn. 442, 445; *Alexandria v. McClary*, 167 Va. 199, 204.

68 If the United States is not a "corporation" or a "State" within the meaning of those terms as used in Section 27 of the Probate Code, the provision that "no other *corporation* can take," etc., is inapplicable; the bequest is neither authorized nor forbidden, and the Code is silent on the subject. In such circumstances we must look elsewhere to determine the sole remaining question, which relates to the legatee's capacity. (There is, as hereinbefore pointed out, no doubt concerning the capacity of the United States under Federal law to take the bequest.) The applicable principles are set forth in the following cases:

Estate of Apple, 66 Cal. 432, 434:

"The code establishes the law of this state respecting the subjects to which it relates"; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and to promote justice—the rule of the com-

mon law that statutes in derogation thereof are to be strictly construed having been expressly abolished here; but where the code is silent, the common law governs.

Matter of Huss, 126 N. Y. 537, 544:

The ability to take the testamentary bequest depends upon the law of the legatee's domicile. Our laws do not prohibit the bequest or the taking, and the sole question to be considered relates to the legatee's capacity.

69 Cf. *In re Neagle*, 39 Fed. 833, 855; affirmed, 135 U. S. 1.

Appellant (but not the Court below) cites *Estate of Loring*, 74 A.C.A. 49, in which a bequest to a municipality in another State was denied. This case was reversed by the Supreme Court upon the ground that the decree distributing the bequest to the municipality had become final and conclusive. *Estate of Loring*, 29 A. C. 428. Some of the statements in the opinion of the District Court of Appeal in the *Loring* case would be demonstrably erroneous if applied to bequests to the United States or its agencies. But the Court was not then dealing with such bequests, was perhaps unfamiliar with the facts and the practice regarding them, and certainly did not have the benefit of the briefs and arguments later presented to *Estate of Hendrix, supra*, and in this case.

The unsupported observation of the District Court of Appeals in *Estate of Loring* regarding "the inherent indisposition of any sovereign state * * * to authorize the transfer of its wealth to the coffers of another state or government" would seem to have little practical bearing upon the validity of the bequest there involved of a comparatively small sum for the construction and maintenance of a hospital. It appears comparable to the bequest to the University of Washington (an institution established and supported by the State of Washington), which was upheld in *Estate of Yule, supra*. But, in any event, a bequest to the United States is a wholly different matter from

70 a bequest to a State (cf. *Testa v. Katt*, 330 U. S. 386, 389) and is applied for the benefit of the people of California no less than for the benefit of the people in other States of the Union.

Moreover, *United States v. Stevens*, *National Home v. Wood*, and *Mauck v. United States*, *supra*, make it clear that a resident of California, acting pursuant to Federal law, can make a testamentary transfer of property to the United

States. To assert the contrary is merely to argue that while this can be done by contract effective at death it cannot be done by will. But when the cases are analyzed, as we have previously done in Part I hereof, we submit that it will be found that the right to make a testamentary transfer by will exists *a fortiori*.

The language quoted by the Court below from *United States v. Fox*, 94 U. S. 315, 321, that "the term 'person' as here used * * * cannot be so extended as to include within its meaning the Federal Government," is, of course, as the Supreme Court pointed out, the construction placed upon the New York statute by the New York Court of Appeals.[3]

That the words "person" and "corporation" when used in a statute do include the United States (except, of course, where the context or legislative history indicate a contrary intention) is made clear in the later decisions of the Supreme Court of the United States. *Ohio v. Helvering* and *Georgia v. Evans, supra*.

71 Furthermore (aside from the opinion of the Court below), the only case found which expressly applied the strict rule of the *Fox* case in determining the "persons" and "corporations" authorized to acquire property by will is *In re Beck's Estate*, 44 Mont. 561. It held invalid a bequest to the Orphans' Home, an institution of the State of Montana. One of the three justices vigorously dissented, stating in part:

> I agree that the right to make testamentary disposition of property depends entirely upon the will of the legislature and that the State may withhold it altogether. Neither is the right to take by descent an inherent one. I also concur in what is said concerning the effect of our Code provisions governing the right to make a will, and of persons and corporations, as such, to take by will. But we must beware of pressing the words of the statute "to a dryly logical extreme." (*Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112.) * * * In *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192 (cited in the majority opinion), it was held that a devise of real estate to the Government of the United States was void for the reason that a law of New York, similar to ours, allowed

[3] The New York law relating to devises to corporations has since been changed and will no longer support the interpretation then placed upon it. See General Corporations Law, Sec. 221; also *id.* Sec. 14 and Decedents' Estate Law, Sec. 12.

real estate to be devised only to natural persons and certain corporations. In my opinion, this decision is founded in a fundamentally erroneous notion of the purpose and effect of the State statute. With due respect for so high authority, it seems to me altogether unreasonable to declare that a sovereign State, holding the original and ultimate right of all property cannot
72 take by will because, forsooth, it has graciously allowed certain of its citizens (practically all of them) to take in like manner.

The direct effect of this decision was overcome by an act of the legislature approved, February 14, 1913 (Mont. Laws 1913, c. 17), specifically authorizing bequests to the State and its institutions. The question later arose regarding the right of a foreign corporation to acquire property by will. The decision unanimously upholding the right indicates that the Supreme Court of Montana no longer entertains the narrow view previously adopted by a majority of the Court in reliance upon *United States v. Fox. In re Hauge's Estate, supra.*

The Courts in California have heretofore upheld the authority of the United States and its agencies to acquire property by will. So far as counsel are aware, it is only in comparatively recent years that the question has been raised in this State. The cases listed below indicate the course of the decisions during the period in which the question has been controverted. (In most instances the amount of money stated is approximate.)

CASES DECIDED BY SUPERIOR COURTS AGAINST THE GOVERNMENT

Estate of Henry Kuhlmey, No. 2377, County of Colusa, 1935. Liberty bond ($500), "to the Letterman Hospital of San Francisco." The contestant contended that the decedent was of unsound mind, that the bequest was
73 charitable and void because made less than 30 days before death, and that the Letterman Hospital was not authorized by California law to take a bequest. The case was decided against the Government, and there was no appeal. The department's file does not indicate the basis of the Court's decision.

Estate of James E. Spencer, No. P-378, County of Los Angeles, 1937. Residue of the estate ($6,000), "to the Government of the United States of America". The Court denied the right of the United States to acquire the property. The Department of Justice decided not to take an appeal in that case but to explore the question further with a view to determining the course to be followed in the future.

In the later cases, in which the right of the Government has uniformly prevailed (except for the decision of the District Court of Appeal in this case), the Courts have been more fully informed by Government counsel regarding the precedents, practice, etc.

CASES DECIDED BY SUPERIOR COURTS IN FAVOR OF THE GOVERNMENT

Estate of Sophie Chanquet, San Francisco, 1930. $3100 (cash and a one-third interest in certain real property), "to the United States Veterans' Bureau for the benefit of the War Veterans' Hospital at Livermore," California. (This is quoted from a letter of the executor of the estate; our files do not contain a copy of the will.)

Estate of Paul E. McDonnol, No. 6724, Riverside County, 1935. Real and personal property ($16,000), "to the Secretary of the Navy * * * for the benefit of the hospital fund U. S. Navy."

74 *Estate of Lena H. Jeffress*, No. 52,104, County of Alameda, 1939. $2500, "to the Home for Disabled Veterans near Livermore, California."

Estate of Theresa C. Armentrout, No. 199,218, Los Angeles, 1941. United States bonds and postal savings certificate ($600), "to the United States of America".

Estate of Lyda Arnold White, Los Angeles, 1943. $2,000, "to the Veteran's Administration facility, at San Fernando, Cal."

Estate of Thomas H. Kullujian, No. 214,061, Los Angeles, 1943. Rug of historic value, "to the United States of America (as a token of my undying gratitude to the American nation for assistance and support given to Armenian orphans during and after the great war)".

Estate of Charles D. Drew, No. 220,248, Los Angeles, 1944. $8,000, "to the inheritance tax fund of my country the United States of America".

Estate of Belle M. Wickham Dawson, No. 27,773, County of Santa Clara, 1945. $800, "to the United States Government".

Estate of Wilafred Hazel Hendrix, No. 217,936, Los Angeles, 1945. $1,500, "to United States Veterans' Administration * * * for the purpose of rendering to disabled veterans of the World War * * * aid comfort, assistance * * *". The decision in favor of the Government was affirmed by the District Court of Appeal, Second Appellate District, 1947. 77 A.C.A. 719.

75 *Estate of William Hines*, No. 100,007, San Francisco, 1946. Defense bonds ($1,000), "to the U. S. Government".

Estate of Eliza Anderson, No. 224,631, Los Angeles, 1946. Real estate ($2,500), "to Uncle Sam (the Government) to be sold and the money to be used for defense".

Estate of Therese L. Van Kirk, No. 216,857, Los Angeles, 1946. Residue of estate ($3,000.), "to the United States of America".

Estate of Jack Cohen, No. 237,727, Los Angeles, 1946. United States defense savings bonds ($1,000), "to the United States of America".

Estate of Jennie Caro, No. 98,571, San Francisco, 1946. Residue of estate ($24,000), "to the U. S. Veterans' Administration for the purpose of aiding and assisting disabled veterans of the present World War".

Estate of Ernest John Ludford, No. 3,694, Imperial County, 1947. United States savings bonds ($700), "to the Government of the United States of America • • • in grateful remembrance for the freedom I have enjoyed under its protection".

Estate of Gust Burnison, No. 102,412, San Francisco, 1947. Personal property ($22,000), "to the United States Government, U. S. A." Order of the Superior Court upholding the will reversed by the District Court of Appeal, First Appellate District, 1948. This is the case covered by this petition.

76 *Estate of Emily P. Sanborn*, No. 241,228, Los Angeles, 1948. United States savings bonds and real property ($18,000), "to the United States of America".

Estate of Philip Rive, No. 100,101, San Francisco, 1948. Cash and securities ($116,000), "to U. S. Treasury Dept. to assist in war effort".

It will be observed from the foregoing that fully one-half of these bequests and devises have been for such purposes as aid to members or former members of the armed forces undergoing hospitalization or domiciliary care, to assist in the war effort, and reduction of the public debt. It is reasonable to believe that others not so expressly stated were moved by such purposes. Then, too, there is the view entertained by some that the desired result is accomplished in substance whether the bequest goes into miscellaneous receipts or into a special account set up for a particular purpose, in view of the overall control by the

Congress of total disbursements.[4] Certainly bequests to the United States *co nomine* and without limitation as to use greatly increased during the war and during the period of uncertainty immediately preceding it.[5]

We further call attention to the fact that in connection with bequests made under some statutes it may be
77 regarded as unnecessary, or superfluous, to specify purpose. Thus, the act of April 3, 1945, *supra*, provides for the redemption of Government bonds donated, bequeathed, or by their terms, payable upon death of the owner, "to the United States or any officer thereof in his official capacity." In view of this statute (as to which, of course, all persons are chargeable with notice) there is a conclusive presumption that unconditional bequests of bonds are for redemption and, thereby, reduction of the public debt.

For the foregoing reasons it is not warranted by law to draw the distinction attempted by the Court below between bequests to the United States *co nomine* without limitation as to use, and bequests for an expressly stated purpose or to an agency of the United States. And we again call attention to section 13,841 of the Revenue and Taxation Code, which exempts "*property transferred to * * * The United States*" from California inheritance taxes. This clearly contemplates bequests to the United States *co nomine* and appears to constitute irrefutable proof that the Legislature of California attaches to section 27 of the Probate Code the meaning herein urged.

III.

IF THE STATE LAW SHOULD BE CONSTRUED AS INVALIDATING THIS BEQUEST IT WOULD VIOLATE THE FEDERAL CONSTITUTION.

To hold that the United States or its agencies may not acquire property by will in California would be to
78 effect an unlawful discrimination against the United States (*Republic Pictures Corp. v. Kappler*, 151 F. (2d) 543, 546-547 (C. C. A. 8), and cases there cited) as well as an infringement of the inherent sovereign power of the United States, derived from the Constitution and im-

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[4] It may be noted in this connection that the late Justice Oliver Wendell Holmes after making certain specific bequests, including a bequest of books, etc., to the Library of Congress, left the residue of his estate merely "to the United States of America". *Estate of Oliver Wendell Holmes*, Adm. No. 47,981, U. S. Dist. Ct., D. C.

[5] Bequests and devises "to further the war program" were accepted by the Secretary of the Treasury and allocated to suitable appropriations under Title XI of the Second War Powers Act (56 Stat. 176, 183).

plemented by statute, to acquire property by will *(Dickson v. United States, supra)*.

It is true that in *United States v. Fox, supra*, the Supreme Court affirmed a holding by the New York Court of Appeals that the United States could not acquire real property by will in the State of New York under the New York statute then in effect. (A bequest of personal property to the United States under the same will had been upheld by the Surrogate and there was no appeal.) Pertinent paragraphs of *United States v. Fox* are quoted below:

> The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivant*, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal govern-
> 79 ment. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State.
>
> Statutes of will, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII, there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution in 1777; and, with some modifications in its language, remains so at this day. Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions, that statute provides that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be

valid unless such corporation be expressly authorized by its charter or by statute to take by devise."

The term "person" is here used applies to natural persons, and also to artificial persons,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term "corporation" in the statute applies only to such corporation as are created under the
80 laws of the State. It was so held by the Court of Appeals in *White v. Howard*, 46 N. Y. 164, 165, and its construction of the statute is conclusive upon us. A devise to the United States of real property situated in that State is, therefore, void.

We feel that *United States v. Fox* was viewed by the Court as an isolated attempt by an individual to transfer to the Federal Government a part of the territory of the State without legislative sanction by either the Congress or the State legislature and notwithstanding the provision in the Revised Statutes, section 3736 (41 U. S. C. 14), that "no land shall be purchased on account of the United States, except under a law authorizing such purchase"—which was the only Federal statute considered in that case.

We believe that the constitutional question was not adequately considered. We further believe that the case would not be followed if the question should again be presented to the Supreme Court of the United States[6] in the light of the long practice, hereinbefore mentioned, the numerous congressional enactments on the subject (including
81 the provision in 40 U. S. C. 304, authorizing the Secretary of the Treasury to sell lands acquired by the United States by devise), and later cases on the general subject. See, for example, the following cases:

United States v. Stevens, National Home v. Wood, and *Mauck v. United States, supra*, upholding the validity of the provision in the statute relating to the National Home for

[6] The natural unawareness of the Court at the time of the decision in *United States v. Fox* of constitutional doctrines not yet formulated, and its concurrence in views then entertained regarding the breadth of Federal power and the consequent limitations upon the State authority which have not prevailed in subsequent opinions of the Court, is well illustrated by *Doyle v. Continental Insurance Company*, 94 U. S. 535, decided at the same term. It held that a State might admit a foreign corporation to do business within the State upon condition that it would not remove to a Federal court a suit instituted against it in a State court, but this decision was overruled in *Terral v. Burke Construction Co.*, 257 U. S. 529, 533.

Disabled Volunteer Soldiers, requiring agreements by applicants for admission to the Home "that all personal property of said applicant shall, on his death * * * at once pass to and vest in said Board of Managers."

Estate of Lindquist and *Estate of Walker*, *supra*, upholding a Federal statute providing for the escheat to the United States of the funds of certain deceased veterans derived from compensation or pensions received from the United States.

United States v. Summerlin, 310 U. S. 414, holding that a State statute limiting the time within which claims can be filed in a probate court does not bar the United States.

Clark v. Allen, 331 U. S. 503, 517: "Rights of succession to property are determined by local law. * * * *Those rights may be affected by an overriding federal policy*, as where a treaty makes different or conflicting arrangements. * * * Then the state policy must give way, * * * " [Italics supplied.]

Quite apart, however, from the soundness of the decision in the *Fox* case, it should be noted that
82 section 27 of the California Probate code is entirely different from the New York statute. Section 27 specifically authorizes bequests "to the state, to counties, to municipal corporations * * *." Under the contention made by appellant, these political entities may take by will in California but the United States Government may not. This, we submit, would be an unlawful discrimination against the United States. The New York statute, on the other hand, merely authorized devises of land "to any person capable by law of holding real estate" and denied the right to take by devise to any corporation unless expressly authorized by charter or statute to do so. No argument was made in the *Fox* case of unlawful discrimination against the United States, nor did the Court address itself to any such argument. There can be little doubt that the California statute, as construed by the Court below, is invalid as an unlawful discrimination against the United States. See *Republic Pictures Corp. v. Kappler*, *supra*, and cases cited; *City of Lincoln v. Ricketts*, 297 U. S. 373, 376; *Testa v. Katt*, *supra*; *Second Employers' Liability Cases*, 223 U. S. 1, 57-58. As the Court remarked in *Republic Pictures Corp. v. Kappler*, *supra*, at page 546:

> A state may not discriminate against rights accruing under federal laws. McKnett v. St. Louis & S. F. R. Co., 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227; Pufahl v. Estate of Parks, 299 U. S. 217, 57 S. Ct. 151, 81 L. Ed. 133. Except the special statute directed at the causes

of action arising under federal law, every other limitation on an action at law or suit in equity in the Iowa
83 statutes is directed at the nature of the claim asserted without reference to the authority which creates the right asserted. This is a discrimination against the United States. The action for overtime under the statute is an action on contract; at least, the federal statute is bottomed upon a contract of employment. As said in Northwestern Yeast Co. v. Broutin, 6 Cir., 133 F. 2d 628, 630: "The federal statute is premised upon the existence of an employement contract * * * The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

Were it not for the fact that plaintiff's right can be traced to a federal statute, he could have brought his action in five years after its accrual if his contract were not written or he could have brought it in ten years if it were written. His claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment of a claim arising under a federal statute in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme. As said by the Supreme Court in Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431, 436, 84 L. Ed. 596, 127 A. L. R. 821: "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way."

While the sphere of sovereignty of the federal government is a limited one, yet its power over the subjects committed to it is full and complete and its laws are "the supreme Law of the Land
84 * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. 6, U. S. Constitution. As a federal right is here involved, the state can not justify a discrimination against such right. Miles v. Illinois Central R. Co., 315 U. S. 698, 62 S. Ct. 827, 86 L. Ed. 1129, 146 A. L. R. 1104.[1]

[1] It is true that *United States v. Fox*, was cited in *Irving Trust Co. v. Day*, 314 U. S. 556, in support of the principle that a State may limit, condition or even abolish the power of testamentary disposition of property within its jurisdiction. The *Irving Trust Company* case, however, did not involve any question of the rights of the United States or of any unconstitutional discriminations.

In conclusion, "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U. S. 394, 401; *Fox v. Washington*, 236 U. S. 273, 277; *Chesebrough v. City and County of San Francisco*, 153 Cal. 559, 567. This Court, therefore, should construe section 27 of the California Probate Code so as to avoid any constitutional difficulties. It is to be remembered, too, that the *Fox* case does not *require* a determination by this Court against the Government. In the *Fox* case the Court was confronted with a ruling of the highest Court of the State of New York holding that the term "corporation" in the New York statute included only corporations created under the laws of the State of New York, which ruling was of course binding on the Supreme Court. Here, however, the scope of the words "corporation" and "state" in section 27 is the question to be decided in this case and this Court is at liberty to, and
85 indeed should construe those words so as to avoid the constitutional difficulties which we have pointed out above. We respectfully submit that the United States is included within the meaning of the terms of section 27.

Conclusion

The State law properly interpreted authorizes the bequest to the United States; if the State law alone does not authorize the bequest it must be read together with the Federal law in order to give effect to the Federal right and to avoid the unconstitutional discrimination that otherwise would result; the decision of the District Court of Appeal should be reversed.

Dated, September 24, 1948.

Respectfully submitted,

George T. Washington
Assistant Solicitor General

Frank J. Hennessy
United States Attorney

Robert B. McMillan
Assistant United States Attorney

John T. Fowler
Attorney, Department of Justice
Attorneys for the United States

All by Robert B. McMillan
Asst. U. S. Atty.

(Appendix Follows)

from the Supreme Court of California to the Supreme Court of the United States; and

It is further ordered that the Clerk of the Supreme Court of California prepare and certify a transcript of the
119 record in this cause, as may be designated by the appellant and appellees, and transmit the same to the Supreme Court of the United States so that the Clerk of said Court shall have said record within sixty days from this date.

Dated: June 16, 1949.

FRED M. VINSON
Chief Justice of the United States

120 In the Supreme Court of the United States

October Term, 1948

Citation in usual form, filed June 21, 1949, omitted in printing.

122 In the Supreme Court of California

In Bank

(Title Omitted)

(File Endorsement Omitted)

Praecipe for Transcript of Record—Filed June 21, 1949

To the Clerk of the Supreme Court of the State of California.

Sir:

You are hereby requested to prepare a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following:

1. Clerk's transcript on appeal as filed in the Supreme Court of the State of California.
2. Proceedings in the Supreme Court of the State of California, including petition of United States for a hearing by the Supreme Court.
3. Petition for appeal.
4. Assignments of errors and prayer for reversal.
5. Statement of jurisdiction on appeal.
123 6. Order allowing appeal.
7. Citation on appeal.

87 *Appendix*

In the District Court of Appeal
State of California
First Appellate District
Division Two
1 Civil No. 13,617

In the Matter of the Estate of
GUST BURNISON,
also called GUSTAV BURNISON, Deceased.
JOE BURNISON,
APPELLANT
PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, and THE UNITED STATES OF AMERICA,
RESPONDENTS.

OPINION

The decedent, a resident of San Francisco, left a will reading as follows:

88 "June 30 1932
205—3rd St.
San Francisco California

This is my last Will & Wish
That I give all I own & Possess to The United States goverenment U. S. A.
The beneficiary shall be excutor
My body shall be cremated after death

Signed GUST BURNISON
Approved July 27 1944"

The testator left personal property appraised at $22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

"At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is no an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly

upon the legislative will, and is derived entirely from the statutes." (Estate of Walker, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L. R. A. 460].)

89 "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Irving Trust Co. v. Day, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A. L. R. 1093].)

By section 27 of the Probate Code our Legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state," the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance.

90 Surely if the Legislature had intended to include the federal government it would have named it. As aptly said in United States v. Cooper Corp., 312 U. S. 600, 606 [61 S. Ct 742, 85 L. Ed. 1071], " 'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the Legislature adopted "An act to authorize the several counties, cities and counties, cities and towns of this State, * * * to receive property by gift, bequest, and devise, * * * " (Stats. 1881, p. 2.) In 1905, an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27.) Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for 24 years. In 1931, then, when the Legislature added "the state" in con-
91 nection with "counties" and "municipal corporations", it could not have meant any state other than California.

The Case of United States v. Fox, 94 U. S. 315 [24 L. Ed. 192], is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the government of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court held (as the state court had, 52 N. Y. 530 [11 Am. Rep. 751]) that this question had to be determined by the laws of New York. The court, speaking through Mr. Justice Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended * * * A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devises of real property while the instant case deals with a bequest of personalty. The reasoning of the Fox case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal

8. Appellant's notice of appeal and statement directing appellees' attention to paragraph 3, rule 12, Rules of the Supreme Court of the United States.
9. This praecipe.
10. Appellees' acknowledgment of service of preceding documents designated as numbers 3 to 9 inclusive.
11. All statements and motions required and permitted to be filed under rule 21 of the Rules of the Supreme Court of the United States.

Dated: June 16, 1949.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

124 In the Supreme Court of the United States

Statement of Points Relied Upon and Designation of Record for Printing—Filed Oct. 11, 1949

Pursuant to Rule 13, paragraph 9 of this Court, the appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record as designated in its praecipe for transcript of record heretofore filed in the Supreme Court of the State of California necessary for the consideration of the points relied upon.

THE UNITED STATES OF AMERICA
PHILIP B. PERLMAN
Solicitor General

CITY OF WASHINGTON,
District of Columbia, ss.

VIOLA A. BARTZ, being duly sworn, deposes and says that there has this day been transmitted by registered letter to Harry N. Grover, attorney of record for appellee Joe Burnison and Henry F. Boyen, attorney of record for appellee Phil C. Katz, Public Administrator of the City and County of San Francisco, in the above entitled cause, copies of appellant's Statement of Points Relied Upon and Designation of Record for Printing, this day duly filed with the Clerk of this Court.

VIOLA A. BARTZ

Subscribed and sworn to before me this 10th day of October, 1949.

GLADYS E. McGAFFEY
Notary Public, D. C.

92 force to this case. Indeed the Supreme Court as recently as 1942 in the Irving Trust Co. case *supra*, cited the Fox case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the Irving Trust Co. case. Its claim that assuming "that the Fox case cannot be distinguished, it must be regarded as overruled," is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether the words "authorized by statute" found in the last sentence of section 27 mean a statute of this state only, or one of any state, or an act of Congress, for the government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has purported to authorize the United States to so acquire property."

The government relies chiefly on Estate of Hendrix, 77 Cal. App. 2d 647 [176 P. 2d 398] and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration," an agency

93 of the government. For the reasons appearing in the Hendrix opinion the questions presented in that case and in this are quite dissimilar. This bequest is to the United States of America, without qualification. It is not to any agency of the government, incorporated or unincorporated, or to the government as trustees, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the Fox case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Code Civ. Proc., § 1858).

The government relies, also, on Dickson v. United States, 125 Mass. 311 [28 Am. Rep. 230], where the court held valid a devise and bequest to the United States of America. In distinguishing the Fox case the court said that that case "proceeded upon the ground that the law of New York

allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees * * * " The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

GOODELL, *J.*

Nourse, P. J., and Griffin, J. pro tem., concurred.

Filed August 18, 1948.

WALTER S. CHISHOLM
Clerk

94 *Affidavit of Service by Mail*

State of California
City and County of San Francisco } ss.:

R. B. McMILLAN being duly sworn, says: That affiant is a citizen of the United States and a resident of the City and County of San Francisco; that affiant is over the age of eighteen years and is not a party to the within and above entitled cause; that affiant's business address is 422 United States Post Office and Courthouse Building, San Francisco, California; that on the 24th day of September, 1948, affiant served the within Petition of Respondent on the attorneys for appellant in said action by placing three true copies thereof in an envelope addressed to the attorneys of record for said appellant, at the business address of said attorneys, as follows:

Messrs. Harry N. Grover and
Everett H. Roan,
Attorneys at Law,
1500 Central Tower,
San Francisco, 3, California;

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at San Francisco, California, where is located the office of the attorneys for the respondent by and for whom said service was made.

That there is a delivery service by mail at the place so addressed, and there is a regular communication by mail between the place of mailing and the place so addressed.

R. B. McMILLAN
Affiant

Subscribed and sworn to before me this 24th day of September, 1948.

MARION M. BENDER

My Commission Expires Dec. 24, 1950.
(Seal) (Copy)

95 In the Supreme Court of California In Bank

ESTATE OF BURNISON, Deceased

BURNISON,
APPELLANT

v.

KATZ, as Public Adm'r., etc., *et al.*,
RESPONDENTS

Order Granting Hearing After Judgment by District Court of Appeal—Filed Oct. 14, 1948

Respondent's (United States of America) petition for hearing GRANTED and cause transferred to this court.

Dated Oct. 14, 1948.

GIBSON
Chief Justice

CARTER
Justice

TRAYNOR
Justice

SPENCE
Justice

(File Endorsement Omitted)

96 In Supreme Court of California

Order of Consolidation—Dec. 7, 1948

The following is a portion of the minutes of the Supreme Court of the State of California on December 7, 1948, at San Francisco:

"S. F. 17620—Estate of Burnison
L. A. 20816—Estate of Sanborn

Causes called and consolidated for purposes of argument.
* * *"

97 In the Supreme Court of California In Bank
S. F. No. 17620

In the Matter of the Estate of
GUST BURNISON, also called Gustav Burnison, Deceased

JOE BURNISON,
APPELLANT

VS.

PHIL C. KATZ, as Public Administrator of the City and County of San Francisco, and THE UNITED STATES OF AMERICA,
RESPONDENTS

(File Endorsement Omitted)

Opinion—Filed March 22, 1949

This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States government U. S. A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident"
98 thereof, that the testamentary "bequest" is therefore "void," and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*In re* Walker, 110 Cal. 387, 390; see, also, Estate of Carpenter, 172 Cal. 268, 269; Estate of Wilkinson, 113 Cal. App. 645, 646.) The legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. (Estate of Durlewanger, 41 Cal. App. 2d 750, 752; Estate of Bauer, 51 Cal. App. 2d 636, 637.) As a necessary postulate of this proposition, it follows that the legislature has the exclusive

power to designate those whom the testator may make the objects of his bounty. (*In re* Wilmerding, 117 Cal. 281, 284.)

Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by
99 the law of his domicile. (Estate of Sloan, 7 Cal. App. 2d 319, 333-334.) It was early recognized in decisions of this state—as Estate of Apple, 66 Cal. 432, 436-437; Whitney v. Dodge, 105 Cal. 192, 197-198; Estate of Lathrop, 165 Cal. 243, 247—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "who may take by will," must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The Government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a
"testamentary disposition," as embracing the United
100 States. But in construing a statute, words are to be taken in their ordinary sense and normal signification (23 Cal. Jur. sec. 109, p. 730; Taylor v. Lundblade, 43 Cal. App. 2d 638, 641; Gayer v. Whelan, 59 Cal. App. 2d 255, 262), and the Government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as "the state," the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." (United States v. Cooper Corporation, 312 U. S. 600, 606, citing Davis v.

Pringle, 268 U. S. 315, 318.) Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. (23 Cal. Jur. sec. 110, p. 732; People v. One 1940 Chrysler Coupe, 48 Cal. App. 2d 546, 549.) Here the collection of "the state" is with "counties" and "municipal corporations," in obvious incongruity if the Government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. (Amendments to the Codes, 1873-74, p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept * * * any gift, bequest and devise. * * *" (Stats. 1881, p. 2.) In 1903 section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. (Stats. 1903, p. 258.) In 1905 the section was further amended to permit "counties" and "municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises (Stats. 1905, p. 605), and the code commissioner's note shows that

"The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 1275.) Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for twenty-four years. Then in 1931, when, upon adoption of the Probate Code, the legislature added to the list of entities privileged to take under a California will "the state"

in connection with "counties" and "municipal corporations," it could not have meant any state other than California.

The case of United States v. Fox, 94 U. S. 315, is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York provided that a devise of lands might be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question presented for consideration was "the validity of a devise to the United States
of real estate situated in the State of New York."
103 The Supreme Court of the United States declared (as the state court had, 52 N. Y. 530, 534) that "this question" was "to be determined by the laws of [New York]." (94 U. S. 320.) Then the court, speaking through Mr. Justice Field, stated at page 321 as follows: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. * * * A devise to the United States of real property situated in that State [New York] is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of United States v. Perkins, 163 U. S. 625, wherein the "single question" presented was
"whether *personal* property bequeathed by will to
104 the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute and within legislative control" (page 627), and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy" (pages

629-630), the court, following citation of the Fox case, *supra*, sustained the propriety of the tax—in "diminution" of the amount the United States would receive under the will—as it was "only upon [such] condition that the legislature assent[ed] to [the] bequest" (page 630). And as recently as 1942 the Supreme Court of the United States in Irving Trust Co. v. Day, 314 U. S. 556, wherein was sustained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra*, among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance*. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) (See, also, Allen v. Markham, 156
105 Fed. 2d 653, 659; Clark v. Allen, 331 U. S. 503, 517.)

The Government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, *supra*, and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation * * * expressly authorized by statute" aid the Government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body" (see State of Ohio v. Helvering, 292 U. S. 360, 370; State of Georgia v. Evans, 316 U. S. 160, 161), the further requirement of the section is concededly unsatisfied in the Government's admission that through "various Federal statutes enacted from time to time have authorized particular agencies of the
106 Government to acquire property by will and to apply it to stated uses * * * no Federal statute of general ap-

plication has purported to authorize the United States to so acquire property." It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator had his domicil" effecting "a restriction as to who may be devisees or legatees." (Dickson v. United States, 12 Mass. 311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United Sates to take "under a will." (United States v. Fox, *supra*, 94 U. S. 315; United States v. Perkins, *supra*, 163 U. S. 625; Irving Trust Co. v. Day, *supra*, 314 U. S. 556.)

Nor does it strengthen the Government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to * * * the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemp-
107 tions, and in making laws relating to these two subjects, over which it had plenary authority, the legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. (*In re* Wilmerding, *supra*, 117 Cal. 281, 286-287.) There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws (Estate of Lindquist, 25 Cal. 2d 697, 705, cert. den. 325 U. S. 869; Estate of Walker, 25 Cal. 2d 719, 720, cert. den. 325 U. S. 869) or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances (United States v. Stevens, 302 U. S. 623; Mauck v. United States, 94 Fed. 2d 745). But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. (United States v. Perkins, *supra*, 163 U. S. 625, 629.)

The Government finally relies on the Estate of Hendrix, 77 Cal. App. 2d 647, to sustain the bequest in question, but

an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the
108 "United States Veterans Administration * * * for the purpose of rendering to disabled veterans of the world war * * * such aid, comfort, [and] assistance * * * as may to them be most helpful and profitable, determinable by said * * * [organization]." (Page 649.) As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers'" (page 652), the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property * * * [which would] embrace gifts by means of wills, as well as by transfers during the lifetime of the donors." (Page 653.) Upon classifying the Veterans' Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California (Prob. Code, sec. 27), the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America" (page 651), that "the United States Government is a corporation" (page 652), that "the [agency] is authorized by statute to take property by will" (page 652), and that therefore the United States Government, functioning through one of its component parts in a designated field of operation, is a "corporation * * * expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. (Page 653.) But the validity of the bequest there involved need not
109. rest on that ground, for, as the court indicated in its reference to the analogous considerations prevailing in the Estate of Yule, 57 Cal. App. 2d 652, the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" (page 654), and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans' Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor" (Estate of Yule *supra*, p. 654), and the further discussion in the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code" (page 650) was unnecessary to the decision, and

certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the Government's reliance upon the Hendrix case in nowise strengthens its position here.

110 In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will," the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

SPENCE, J.

WE CONCUR:
Gibson, C. J.
Shenk, J.
Carter, J.
Schauer, J.

I CONCUR IN THE JUDGMENT:
EDMONDS, J.

111 In the Supreme Court of California

Estate of BURNISON
S. F. No. 17620

Dissenting Opinion

I dissent for the reasons set forth in Estate of Hendrix, 77 Cal. App. 2d 647, 651-653.

TRAYNOR, J.

112 In the Supreme Court of California In Bank

Estate of B[illegible]NISON

Order Denying Petition for Stay of Remittitur—Filed April 25, 1949

Petition for stay of remittitur denied.

Dated: Apr. 5, 1949.

GIBSON
Chief Justice

(File Endorsement Omitted)

113 Supreme Court of California

Clerk's Certificate to foregoing transcript omitted in printing.

114 In the Supreme Court of the United States

(Title Omitted.)

(File Endorsement Omitted)

Petition for Appeal to the Supreme Court of the United States—Filed June 21, 1949

To: The Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States.

Now comes the United States of America, petitioner herein and states that on the twenty-second day of March, 1949, the Supreme Court of California entered judgment against it, holding that a bequest to it was void under Section 27 of the Probate Code of the State of California.

Petitioner, believing that the judgment of the Supreme Court of California incorrect, has applied to the Chief Justice of the Supreme Court of California for an allowance of the appeal, and it is informed that on June 14, 1949 the Chief Justice of the Supreme Court of California has refused to allow the appeal. Therefore it prays this Court that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of the Supreme Court of California and that a transcript
115 of the record of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of this Court to entertain an appeal in this case.

Dated June 15, 1949.

UNITED STATES OF AMERICA
By PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

116 In the Supreme Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Assignment of Errors and Prayer for Reversal—Filed June 21, 1949.

Now comes the United States of America, respondent in the above-entitled cause, and in connection with its appeal

herein files the following assignment of errors upon which it will rely in its prosecution of said appeal to the Supreme Court of the United States from the judgment of the Supreme Court of California dated March 22, 1949. The Supreme Court of California erred:

1. In holding that Section 27 of the Probate Code of California, barring the United States from receiving testamentary gifts under wills of California domiciliaries, does not infringe the inherent sovereign power of the United States derived from the Constitution.

2. In holding that Section 27 does not effect an unconstitutional discrimination against the United States.

117 3. In holdng that there is no constitutional requirement that the state allow the United States to take under a will.

4. In holding that a state's power to control the descent of property is free from any constitutional limitation.

5. In holding that the entire matter of the right of testamentary disposition is within the control of the state having jurisdicion of the property in question.

WHEREFORE, respondent United States of America prays that said judgment of March 22, 1949 be reserved.

Dated: June 15, 1949.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

118 In the Supreme Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Order Allowing Appeal—Filed June 21, 1949

United States of America, having prayed for an allowance of an appeal to the Supreme Court of the United States from the final judgment rendered by the Supreme Court of the State of California in the above-entitled cause and having presented and filed its petition for appeal, assignments of error and prayer for reversal and a statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is now ordered that an appeal be and the same is hereby allowed in the above-entitled cause as provided by law,

125 Supreme Court of the United States

Order Noting Probable Jurisdiction—October 10, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE: 859689 NO. 9....1949

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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 185

THE UNITED STATES OF AMERICA,
APPELLANT,

vs.

CHARLES F. GAFFEY, ANNIE I. HARRIS,
GEORGE E. BREECE, et al.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED JULY 12, 1949

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 188

THE UNITED STATES OF AMERICA,
APPELLANT,

VS.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, *et al.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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1 In the Superior Court of the State of California
in and for the County of Los Angeles

In the Matter of the Estate of
EMILY P. SANBORN, Deceased.

First and Final Account, Report, Petition for Allowance of Fees to Special Administratrix and Administratrix with the Will Annexed, and Petition for Final Distribution, and for Approval of Assignments to Attorneys—Filed July 10, 1947.

To The Honorable, The Superior Court of the State of California, in and for the County of Los Angeles:

ANNIE L. HARRIS, Administratrix with the Will Annexed of the Estate of Emily P. Sanborn, Deceased, renders to the Court her First and Final Account, Report, Petition for Allowance of fees to Special Administratrix and Administratrix with the Will Annexed, and Petition for Final Distribution and for Approval of Assignments to Attorneys, and for such Report and Petition alleges as follows, to-wit:

That said Administratrix is chargeable with items set forth in Exhibit "A" of said Administratrix's First and Final Account, hereto attached and made a part hereof, in the sum of $35,828.41

That said Administratrix is entitled to credits as set forth in Exhibit "B" of said
2 Administratrix's First and Final Account hereto attached and made a part hereof, in the sum of ..... $ 1,286.20

That said Administratrix has a balance on hand as set forth in Exhibit "C" of said Administratrix's First and Final Account, hereto attached and made a part hereof, in the sum of $34,542.21

That the above named decedent became deceased in the County of Los Angeles, State of California, on the 4th day of February, 1945, leaving as her next of kin the following named persons, with their relationship to the said decedent and the value of interest of her estate to which each is entitled, set opposite each respective name:

Name	*Relationship*	*Value of Interest of Estate*
Charles F. Gayetty	Grand-Nephew	1/4
Annie L. Harris	Niece	1/8
George E. Breece	Grand-Nephew	1/8
Ben Roy	Nephew	1/12

Name	*Relationship*	*Value of Interest of Estate*
Merle Gile	Nephew	1/20
Gertrude Barron	Niece	1/20
Margelia Gile Bernard	Grand-Niece	1/20
3 Elteen Knowles	Grand-Niece	1/48
Ralph Thibault	Grand-Nephew	1/48
Glen Thibault	Great-grand-Nephew	1/48
Angelia Nichols	Grand-Niece	1/48
Edna L. King	Grand-Niece	1/60
Ferne L. Thibideau	Grand-Niece	1/60
Leona M. Dickinson	Grand-Niece	1/60
Edith M. Dickinson	Grand-Niece	1/60
Loretta A. Dickinson	Grand-Niece	1/60
Geneva Gile Fuller	Grand-Niece	1/80
Herman Gile	Grand-Nephew	1/80
Harold Gile	Grand-Nephew	1/80
Floyd Gile	Grand-Nephew	1/80
Sherman Gile	Grand-Nephew	1/200
Earland Gile	Grand-Nephew	1/200
Rena Gile	Grand-Niece	1/200
George Gile	Grand-Nephew	1/200
Chester Gile	Grand-Nephew	1/200
La Forest Gile	Grand-Nephew	1/200
Hazel Gile Farington	Grand-Niece	1/200
Ralph Gile	Grand-Nephew	1/200
Wellington Gile	Grand-Nephew	1/200
Bernard Gile	Grand-Nephew	1/200

That the above named persons are the only heirs at law of the said decedent, she having died without living issue or a child or children or other descendants of any deceased issue.

4 That on or about the 23rd day of March, 1945, your petitioner, in her individual capacity, as an heir of said decedent entitled to succeed to a portion of said estate and as such entitled to Letters of Administration with the Will Annexed, filed with the Clerk of the above entitled court a document dated the 12th day of June, 1942, purporting to be the Last Will and Testament of said decedent and did on said day file herein a petition for the probate thereof; that Willis Sargent was named in said document as the Executor thereof but that he was on active naval duty at the time of decedent's death and was unable to act in such capacity; that he did thereafter

file herein his renunciation of said trust; that by the terms of said document the said decedent devised and bequeathed to the United States of America all of her real property and all of the United States Government Bonds, of which she died possessed; that said document will be hereafter referred to as the "Government Will"; that said petition for the probate of said Government Will did expressly state therein your petitioner's hostility to the provisions thereof insofar as the same disposed of any property of said estate to the United States of America and was filed by your petitioner for the sole and only purpose of bringing said Government will to the attention of the Court, to the end that the validity of its provisions be determined by said Court.

That on or about the 6th day of March, 1945, there was filed for probate in the above entitled court by Garland L. Brunton, a document dated the 28th day of December, 1944, claimed by him to be the Last Will and Testament of the decedent, together with a petition for probate thereof; that said document will hereafter be referred to as the "Brunton Will"; that thereafter said Brunton filed herein his contest of and opposition to the said Government Will upon the ground that said Brunton Will was the later and last will of said decedent.

That said heirs at law duly filed herein their answer to said contest and their contest and opposition to the said Brunton Will upon the grounds of testamentary incapacity, fraud, undue influence, lack of testamentary intent and that said document was not executed with the formalities required by law; that after said contests were at issue, the same were tried before the above entitled court, without a jury, in Department 2, thereof, the Honorable Harry R. Archbald, Judge Presiding, which said trial thereon took place from on or about the 18th day of October, 1945, to on or about the 30th day of October, 1945; that said court thereafter made and entered its decrees admitting said Government Will to probate and denying said Brunton Will to probate; that said decrees are now final.

That after proceedings duly had before the above entitled court, your petitioner was appointed by said court as special administratrix of said estate, with powers of a general administrator, and on or about the 18th day of April, 1945, special letters of administration with said powers were issued to your petitioner, who from said time until on or about the 1st day of April, 1947, was

the duly appointed, qualified and acting special administratrix of the said estate; that during said time, petitioner, as such special administratrix, managed the affairs of said estate and took such action and did such things as were reported by her as such special administratrix in her current and final accounts and reports as special administratrix, all of which have been approved and allowed by said court and are in file herein.

That on or about the said 1st day of April, 1947, and after proceedings duly had before said court, your petitioner was discharged by said court as special administratrix of said estate, and appointed by said court as administratrix with the will annexed of said estate, to whom on or about said date Letters of Administration with the Will Annexed were issued to your petitioner, who ever since said time has been and now is the duly appointed, qualified and acting administratrix with the will annexed of the said estate.

That an inventory and appraisement of the property and assets of said estate was heretofore filed herein, reflecting the total value of said estate to be the sum of $21,612.00; that thereafter an inventory and reappraisement of some of the property of said estate was filed herein, showing the value of said reappraised property to be $6500.00 in excess of the sum originally appraised; that the total ap-
7 praised value of said estate, including the appraised value of the property not reappraised and the value of the reappraised property, is the sum of $28,112.00.

That, as shown by the current and final accounts and reports of your petitioner, as special administratrix, and the petition for confirmation of each sale, all of which are on file herein, petitioner, as such special administratrix, sold the property of the said estate, hereafter set forth, after confirmation of each respective sale thereof, to the persons and for the amounts and for the gain thereon, as follows:

To Rose Veres the real property described in the inventory and appraisement on file herein as Parcel No. I for the sum of $5350.00, said sum being $850.00 above and beyond the re-appraised value thereof; to Rose Veres the real property described in the inventory and appraisement on file herein as Parcels No. 3 and 4 together with all household furniture and furnishings belonging to said estate, contained therein, for the sum of $11,000.00 said sum being $1185.00 above and beyond the reappraised value thereof.

That included in the assets of said estate was that certain unimproved real property described in the inventory and appraisement on file herein as Parcel No. 5; that your administratrix has maintained in effect on said property a grazing lease throughout these proceedings; that your administratrix successfully caused to be negotiated an extension of an oil and gas lease on said property under
8 terms most advantageous to said estate, which said lease was approved by the above entitled court after proceedings duly had.

That notice to creditors of said estate has been duly published as required by law and more than six months have elapsed since the first publication thereof; that all claims against said estate have been paid; that all taxes chargeable to said estate or which might be liens or charges against any of the property of said estate have been paid in full, except Inheritance Taxes chargeable to the heirs at law of said decedent; that there has been filed concurrently herewith Stipulation executed by counsel for the California State Controller and counsel for your petitioner, stipulating that this petition for final distribution may be filed and heard and determined by said court prior to the filing of the Inheritance Tax Report on said estate and the payment of Inheritance Taxes thereon, which said Stipulation is on file herein; that should the court determine that the heirs at law of said decedent are entitled to distribution of said estate, the aggregate sum of $350.00 will be due from said heirs at law for Inheritance Taxes, but should said court determine that the United States of America is entitled to distribution of the aforesaid portion of said estate, no Inheritance Taxes whatsoever will be due to the State of California; that said estate is now ready to be closed. That the United States of America claims to be entitled to have distributed to it all the United States Government
9 Bonds of the said decedent and all of her real property, or the net proceeds from such thereof as has been sold in probate, under the terms and provisions of said Government Will; that the heirs at law of said decedent claim to be, and your petitioner alleges that they are, entitled to distribution of the whole of said estate; that the United States of America is not the state contemplated by Section 27 of the Probate Code of the State of California, and the same is not a county, a municipal corporation, a natural person, or an unincorporated religious or an unincorporated benevolent or an unincorporated fraternal

society or an association, or a lodge, or a branch of any of the foregoing, and the same is not a corporation formed for religious or scientific or literary purposes, or solely for educational or hospital or sanatorium purposes, and was not formed primarily for public preservation of natural forests or natural scenery or to maintain public libraries, museums, or art galleries, or for any other similar purpose, or a corporation expressly authorized by Statute to take under a will.

That J. Frank Martin, Jr. and J. Harold Decker are attorneys at law, duly licensed to practice their profession before all of the courts of the State of California; that said attorneys were employed by the heirs at law of the said decedent to represent them in connection with said estate and all of said heirs, except Loretta A. Dickinson, Hazel Gile Farington, Ralph Gile, Wellington Gile, and
10 Bernard Gile, made, executed and delivered to said attorneys, each, a document, among other things, assigning to said attorneys an undivided thirty-five per cent (35%) interest of whatever money or property he or she might have distributed to him or her in these proceedings, and expressly authorized the court having jurisdiction of said estate to direct the distribution thereof directly to said attorneys; that true and correct copy of the form of said assignments is attached hereto and marked Exhibit "D", and the originals thereof are on file herein; that the said assignments are fair and equitable and the consideration therefore is adequate, in this; that the said Brunton Will purported to dispose of all of the property of the said decedent to Garland L. Brunton, whereby it became necessary to defend said Government Will and to protect the said estate and the heirs at law of the said decedent and the United States of America, named therein as sole legatee, from distribution of the entire estate of the decedent to the said Garland L. Brunton under what appeared to be a spurious will; that the said attorneys made all necessary investigations preliminary to the filing of the contest thereof and interviewed many witnesses in connection therewith; that they filed all necessary documents by way of opposition to said Brunton Will and personally tried the contest thereof for approximately eight days in Department 2 of the above entitled court; that all of the work which was done by said attorneys in connection therewith was done with-
11 out any assistance whatsoever from anyone interested in the estate other than the heirs at law of the

said decedent, which said heirs at law have paid all of the costs incident to the preparation and trial of said contests, which have resulted in defeating said Brunton Will and establishing said Government Will as the Last Will and Testament of said decedent; that the efforts of the said attorneys were directly responsible for the result of said litigation, to-wit; a decree of said court denying said Brunton Will to probate and a decree of said court admitting said Government Will to probate, thereby saving the whole of said estate for those legally entitled thereto; that said attorneys have received no other or additional compensation for said services nor are said heirs obligated by contract to pay any other or additional compensation.

That the only person who was appointed by the above entitled court as the legal representative of said decedent in these proceedings is your petitioner who has acted as both special administratrix and administratrix with the will annexed, as hereinabove alleged; that as such representative she has rendered to the said estate all of the ordinary services required of administrators or executors and is entitled to her statutory fee therefor in the sum of $1,076.38.

That petitioner has for distribution the following property belonging to the said estate as more fully set forth in said Exhibit "C" of said administratrix's Final Account:

Cash in the amount of $20,745.21; Government Bonds
12 in the amount of $1,144.00; Stocks in the amount of $4,608.00; Two parcels of real property, one of which is unimproved land appraised at $4,000.00 and one parcel improved with a dwelling house together with all household furniture and furnishings belonging to said estate contained therein reappraised at $4,045.00.

WHEREFORE, petitioner prays as follows, to-wit:

1. That said account be by said court settled, allowed and approved.

2. That the court make its order allowing to petitioner her statutory fee for ordinary services rendered by her as special administratrix and administratrix with the will annexed in the sum of $1,076.38.

3. That the court determine the amount due to the attorneys for said estate for both statutory and extraordinary fees and allow such amount to said attorneys therefor.

4. That the court approve the assignments of J. Frank Martin, Jr. and J. Harold Decker, hereinabove alleged, and make its order for the distribution of all of the property of said estate in the hands of your petitioner, less the

amount fixed and allowed by said court as ordinary fees to your petitioner and ordinary and extraordinary fees to said attorneys chargeable to said estate as said court may determine, together with all of the property of the said decedent which may hereafter be discovered as follows, to-wit:

To J. Frank Martin, Jr. and to J. Harold Decker—
13 33.716 per cent thereof; to Charles F. Gayetty—16.25 per cent thereof; to Annie L. Harris and George E. Breece, each, 8.125 per cent thereof; to Ben Roy—5.416 percent thereof; to Merle Gile, Gertrude Barron, and Margelia Gile Bernard, each, 3.25 per cent thereof; to Elteen Knowles, Ralph Thibault, Glen Thibault and Angelia Nichols, each, 1.354 per cent thereof; to Edna L. King, Ferne L. Thibideau, Leona M. Dickinson, and Edith M. Dickinson, each 1.083 per cent thereof; to Geneva Gile Fuller, Herman Gile, and Floyd Gile, each, .8125 percent thereof; to Sherman Gile, Earland Gile, Rena Gile, George Gile, Chester Gile, and LaForest Gile, each, .3255 per cent thereof; to Loretta Dickinson—1.667 per cent thereof; to Hazel Gile Farington, Ralph Gile, Wellington Gile, and Bernard Gile, each, .5 per cent thereof.

5. That after distribution of the said estate by petitioner pursuant to the decree of said court entered hereon, she be discharged as administratrix with the will annexed and her bond exonerated.

6. For such other and further relief as to the Court may seem proper in the premises.

ANNIE L. HARRIS
Annie L. Harris
Administratrix, with the Will Annexed
Petitioner

J. FRANK MARTIN, JR. and
J. HAROLD DECKER

By: J. HAROLD DECKER
Attorneys for Estate

14 *Exhibit "A"*

FIRST AND FINAL ACCOUNT OF ADMINISTRATRIX WITH WILL ANNEXED

Administratrix chargeable on settlement of Final Account of Special Administratrix	$34,812.61
Rents from Real Estate from February 14 to June 30, 1947	522.00
Dividends	43.80

Prorata refund of premium on bond of Special Administratrix			50.00
Profit on sale of real property described in inventory as Parcel No. I:			
Sale Price	$5350.00		
Re-appraised at	4500.00	$ 850.00	
Less deposit previously reported		535.00	315.00
Profit on sale of real property described in inventory as Parcels No. 3 and 4 together with furniture therein contained:			
Sale Price	$11,000.00		
Re-Appraised at	9,815.00	$1,185.00	
Less deposit previously reported		1,100.00	85.00
Administratrix is chargeable with			$35,828.41

15 *Exhibit "B"*

FIRST AND FINAL ACCOUNT OF ADMINISTRATRIX WITH WILL ANNEXED

Said Administratrix is entitled to credits as follows:

Costs of sale in escrow of Parcel No. I:		
Taxed, January 1, 1947 to June 13, 1947	$ 31.48	
Proration of rents	.67	
Commission to Edward J. Crowley	267.50	
Policy of Title Insurance	35.00	
Escrow costs	16.00	
Revenue Stamps	6.05	
Recording order confirming sale	1.50	$358.20
Costs of sale in escrow of Parcels No. 3 and 4:		
Taxes, January 1, 1947 to June 2, 1947	$ 67.57	
Proration of rents	50.17	
Commission to Edward J. Crowley	550.00	
Policy of Title Insurance	47.50	
Escrow costs	21.00	
Revenue stamps	12.10	
Recording order confirming sale	1.00	$749.34
Commission to Rose Kinnamon as authorized by Court		$ 33.00

16

Date	*Voucher No.*	*Payee*	
4/15/47	51	Department of Water and Power, Water service ...	$ 8.29
4/15/47	52	Frank J. Ryan Co., Premium on Administratrix bond	120.00
6/16/47	53	Department of Water and Power, Water service ...	9.92
6/16/47	54	Wilbur G. Smith, Process service	5.00
6/17/47	55	J. Frank Martin, Jr., refund for costs advanced for certified copy of order confirming sale of real property	1.10
		Bank Charges	1.35
Administratrix is entitled to total credits of			$1,286.20

17 *Exhibit "C"*

FIRST AND FINAL ACCOUNT OF ADMINISTRATRIX WITH WILL ANNEXED

Balance on hand consists of:	
Cash	$20,745.21
Real property, Parcel No. 2, inventoried at..	4,000.00
Real property, Parcel No. 5, inventoried at..	4,000.00
Household furniture and furnishings inventoried at	45.00
Stocks, inventoried at	4,608.00
United States Government Bonds, inventoried at	1,144.00
Total Balance on Hand	$34,542.21

18 *Summary*

FIRST AND FINAL ACCOUNT OF ADMINISTRATRIX WITH WILL ANNEXED

Said Administratrix is entitled to credits of ...	$ 1,286.20
Balance on hand	34,542.21
Total Credits	$35,828.41
Said administratrix is chargeable with	$35,828.41

19 *Exhibit "D"*

The undersigned, one of the heirs of my late aunt, Emily P. Sanborn, deceased, hereby appoints J. Frank Martin, Jr. and J. Harold Decker, attorneys at law, Los Angeles, California, to represent me in connection with all matters pertaining to the estate of my said aunt. I understand that in order that my interest therein be protected, appropriate legal action or actions must be taken against the United States of America and Garland L. Brunton, who will be entitled to the whole of said estate if certain documents, testamentary in character, executed by my said aunt in her lifetime, are not declared to be inoperative as Last Wills, and said action or actions prosecuted to final judgment unless sooner settled.

I hereby empower my said attorneys to take whatever legal steps are, in their sole opinion and discretion, appropriate to protect my said interest to the end that I receive from said estate as heir at law the greatest possible amount, either through litigation or settlement.

For the service of said attorneys I hereby agree to pay to them an amount equal to thirty-five per cent (35%) of all money recovered by me from said estate, either by way of judgment, distribution or settlement, and to give to them an undivided thirty-five per cent (35%) interest in and to all of my right, title and interest in and to all property, both real and personal, which I may receive, or become entitled to receive therefrom, either by way of judg-
20 ment, distribution or settlement. This agreement shall for all purposes be deemed an assignment of said money and property, and I hereby expressly authorize the probate court having jurisdiction of said estate to authorize and direct the distribution thereof directly to the said attorneys in said probate proceedings.

I hereby authorize said attorneys to compromise and settle for me and in my name and stead any and all disputes or controversies and any and all litigation that may hereafter exist between me and the said United States of America and/or Garland L. Brunton, or any other person or corporation, upon whatever terms and conditions said attorneys in their sole and absolute discretion may deem advisable, and to that end hereby authorize them to execute for me and in my name and stead and on my behalf any and all necessary stipulations, consents to judgments and agreements which shall have for all purposes the same legal effect as though I were personally present and personally executed the same.

It is estimated that the sum of Two Hundred Dollars ($200.00) will be required to defray the costs in connection with proceedings in the lower court to establish the interests of all of the heirs of the decedent, and the undersigned will forthwith advance to said attorneys his prorata share thereof, to wit the sum of $.....

Dated this day of , 1945.

Approved this day of , 1945.

.....

Heir at Law of
Emily P. Sanborn, Deceased

21 *Duly sworn to by Annie L. Harris.*
Jurat omitted in printing. (All in italics.)

22 (File Endorsement Omitted.)

23 In Superior Court of Los Angeles County

Affidavit of Posting Notice of Hearing, Final Account and Distribution and Allowance of Extra Fees Etc. and Notice of Hearing—filed July 17, 1947

State of California, }
County of Los Angeles } ss.

H. Rogers being first duly sworn, says that on July 17, 1947, at the request of the Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, he posted a notice (a copy of which notice appears on the reverse side hereof) at the courthouse in the said County of Los Angeles.

H. Rogers

Subscribed and sworn to before me this 17 day of July 1947.

J. F. Moroney
County Clerk
By H. Hudson
Deputy

Notice of Hearing

Notice is hereby given that Annie L. Harris as administratrix with will annexed of the above-entitled estate, has filed with the Clerk of this Court a petition for order settling final account and for distribution, allowing extra fees

and approving assignments to which reference is hereby made for further particulars; and that the hearing of the same has been set for August 4, 1947, at 9:30 o'clock A. M., in Department 4 of the Superior Court of the State of California, in and for the County of Los Angeles. All persons interested are hereby notified to appear at the time and place mentioned in this notice and show cause, if any they have, why the order should not be made.

J. F. MORONEY
County Clerk
By A. McLEAN
Deputy

Dated July 17, 1947.

(File Endorsement Omitted)

In the Superior Court in and for the County of Los Angeles

No. 241228

In the Matter of the Estate of
EMILY P. SANBORN, Deceased

Decree of Final Distribution and Allowance of Statutory Commissions to Administratrix—filed May 6, 1948.

The petition of Annie L. Harris, as Administratrix with the Will Annexed of the Estate of Emily P. Sanborn, Deceased, for Decree of Distribution and Allowance of Statutory Commissions to Administratrix, J. Harold Decker and J. Frank Martin, Jr., appearing as attorneys for said petitioner and for certain of the heirs at law of said deceased, and James M. Carter, United States Attorney by Clyde C. Downing, assistant United States Attorney, for the United States of America, the legatee named in the Will of said deceased, coming on regularly to be heard the 15th day of October, 1947 in Department 4 of the above entitled Court, the Honorable Harold B. Jeffery, Judge presiding, and it appearing that the United States of America having objected to the petition for distribution; and it appearing further to said court that due notice of the hearing on said petition was given as provided by law; that all inheritance taxes and all personal property taxes due and payable by said estate have been paid; that personal income taxes have been paid or secured; and that the Final account and Supplement thereto has been settled and allowed and that attorneys fees, both statutory and extraordi-

nary have heretofore been fixed and allowed and that the assignments by certain of the heirs of decedent to the attorneys for said estate have heretofore been approved:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that notice to creditors has been duly given as required by law and that the said Annie L. Harris has in her possession belonging to said estate, after deducting credits to which she is entitled, as shown by her Second Supplement to the Final Account, a balance of $20,849.03, of which $15,705.03 is in cash and the remainder consists of the property hereinafter described at the appraised value; that a portion of said estate was not disposed of by the last Will of deceased which said portion shall be distributed to the heirs at law of said deceased as hereinafter set forth; that out of the residue of cash in her hands said Administratrix retain $1,076.38 as commissions allowed by law for her services; that in pursuance of and according to the provision of the Last Will of deceased and pursuant to the order heretofore entered fixing and allowing fees to attorneys, both ordinary and extra-ordinary, the following described property, and all other property belonging to said estate whether described herein or not, be and the same hereby is distributed in the following manner:

27 To the United States of America, cash representing monies received as net income from real property and conversion values of real property sold in these proceedings in the amount of $12,689.78; United States Savings Bonds, Series E, Certificates Nos. L5228126E, Q12501095E, Q12501096E, LI6122862E, L6122861E, Q14911609E, Q14911610E, Q14911611E, Q14911612E, L6886015E, L6886016E, L8664802E, L8664801E, C13581197E, L18778357E, L18778356E, L25541058E, L25541059E, L34770404E, L34770403E, C35637031F, C44034049E, C58515954E, C58515955E, C65940052E, C65940051E; Lots Number three (3) and four (4), South Half (S½) of Northwest Quarter (NW¼) and Northeast Quarter (NE¼) of Southwest Quarter (SW¼) of Section Five (5), Township Three (3) North, Range Sixteen (16) West S. B. B. & M., and Southeast Quarter (SE¼) of Northeast Quarter (NE¼) and East Half (E½) of Southeast Quarter (SE¼) of Section Six (6), Township Three (3) North, Range Sixteen (16) West, S. B. B. & M., County of Los Angeles, State of California, subject to: (1) Oil and Gas Lease to J. H. Reavis, dated November 10, 1939 recorded August 6, 1940, in Book 17764, Page 24, Official Records of

Los Angeles County, as modified by Modification of Oil and Gas Lease dated July 31, 1943 recorded August 6, 1940 in Book 17756, Page 59, Official Records of Los Angeles County, (2) Mineral Deed of One per cent (1%) to Willis Sargent dated May 16, 1941 recorded May 19, 1941 in Book
28 18469, Page 27, Official Records of Los Angeles County; an amount equal to 92.45 per cent of all monies hereafter received as refunds of Federal and California income taxes paid by the estate.

All of the rest, residue and remainder of said estate, including cash remaining after payment of allowed charges in the approximate amount of $1,938.87 be and the same hereby is distributed to the only heirs at law of said deceased surviving at the time of her death which names and relationship to the decedent, and the proportion to be taken by each of them is as follows:

To Charles F. Gayetty, grand-nephew, one-fourth (¼) thereof, to Annie L. Harris, niece, one-eighth (⅛) thereof, to George E. Breece, grand-nephew, one-eighth (⅛) thereof, to Ben Roy, nephew, one-twelfth (1/12) thereof, to Merle Gile, nephew, one-twentieth (1/20) thereof, to Gertrude Barron, niece, one-twentieth (1/20) thereof, to Margelia Gile Bernard, grand-niece, one-twentieth (1/20) thereof, to Elteen Knowles, grand-niece, one forty-eighth (1/48) thereof, to Ralph Thibault, grand-nephew, one forty-eighth (1/48) thereof, to Glen Thibault, great-grand-nephew, one forty-eighth (1/48) thereof, to Angelia Nichols, grand-niece, one forty-eighth (1/48) thereof, to Edna L. King, grand-niece, one sixtieth (1/60) thereof, to Ferne L. Thibideau, grand-niece, one sixtieth (1/60) thereof, to
29 Leona M. Dickinson, grand-niece, one sixtieth (1/60) thereof, to Edith M. Dickinson, grand-niece, one sixtieth (1/60) thereof, to Loretta A. Dickinson, grand-niece, one sixtieth (1/60) thereof, to Geneva Gile Fuller, grand-niece, one eightieth (1/80) thereof, to Herman Gile, grand-nephew, one eightieth (1/80) thereof, to Harold Gile, grand-nephew, one eightieth (1/80) thereof, to Floyd Gile, grand-nephew, one eightieth (1/80) thereof, to Sherman Gile, grand-nephew, one two-hundredths (1/200) thereof, to Earland Gile, grand-nephew, one two-hundredths (1/200) thereof, to Rena Gile, grand-niece, one two-hundredth (1/200) thereof, to George Gile, grand-nephew, one two-hundredth (1/200) thereof, to Chester Gile, grand-nephew, one two-hundredth (1/200) thereof, to La Forest Gile, grand-nephew, one two-hundredth (1/200) thereof, to Hazel Gile Farington, grand-niece, one two-hundredth (1/200)

thereof, to Ralph Gile, grand-nephew, one two-hundredth (1/200) thereof, to Wellington Gile, grand-nephew, one two-hundredths (1/200) thereof, to Bernard Gile, grand-nephew, one two-hundredth (1/200) thereof.

Dated this 6th day of May, 1948.

HAROLD B. JEFFERY
Judge of the Superior Court

Approved as to form:
JAMES M. CARTER, *United States Attorney*
By CLYDE C. DOWNING, *Assistant U. S. Attorney*
May 6th, 1948

30 (File Endorsement Omitted)

31 In Superior Court of Los Angeles County

Last Will—filed March 23, 1945

I, EMILY P. SANBORN, of the City of Los Angeles, County of Los Angeles and State of California, being of full age, sound mind and disposing memory and not acting under menace, duress, undue influence or fraud of any person whatsoever, do hereby make, publish and declare this instrument as and for my Last Will and Testament, hereby revoking all former wills by me made, in the manner following:

All of my property and property rights which I now have and own, and of which I may die seized or possessed, is my separate property.

ITEM ONE

I am a widow, my husband having died heretofore, and I have no children, grandchildren or issue of my body; and, I leave nothing to any of my nephews and neices or to any others of my collateral heirs.

ITEM TWO

I direct the executor of this my Will, hereinafter named, or the administrator-with-the-will-annexed who may be appointed to administer my estate, shall first pay the expenses of my last illness, funeral and burial, and my just debts.

—Page one—

ITEM THREE

32 I hereby give, devise and bequeath unto the UNITED STATES OF AMERICA, all of my bonds issued by the United States Government, which stand in my name and

which I may hereafter acquire in my name, and all of the real properties and interests in real properties which I now own and of which I shall or may die seized or possessed.

ITEM FOUR

I hereby nominate and appoint my friend, WILLIS SARGENT, an attorney-at-law having offices in said City of Los Angeles, as executor of this my Will, without bond.

IN WITNESS WHEREOF, I have hereunto subscribed my name this 12th day of June, 1942.

EMILY P. SANBORN

Emily P. Sanborn, Testatrix

The foregoing instrument, consisting of two pages, including this page, was at the date thereof by said EMILY P. SANBORN signed on this page and on the margin of the next preceding page hereof and sealed and published as and declared to us to be her last Will and Testament, in the presence of us and each of us, who, at her request and in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

WILLIAM HAZLETT residing at 1517 Fair Oaks Ave.,
South Pasadena, California

MRS. JESSIE B. HAGGERTY residing at 229 East Adams Blvd.
Los Angeles, California

—Page Two—

33 (File Endorsement Omitted)

34 In the Superior Court in and for the
County of Los Angeles

(Title omitted)

Order Admitting Will to Probate—filed Feb. 18, 1946

The matter of the contest by contestant, Garland L. Brunton, of the document offered for probate by the respondent, Annie L. Harris, entitled "Last Will", and dated the 12th day of June, 1942, having come on regularly for trial on the 18th day of October, 1945, in Department 2 of the above entitled Court, the Honorable Harry R. Archbald, Judge Presiding, said matter being tried before said Court, sitting without a jury, on the 18th, 19th, 22nd, 23rd, 24th, 25th, 26th, and 29th days of October, 1945, trial by jury having been duly waived by said parties, said contestant being represented thereat by Harry Rabwin, Esq., and said respondent being represented thereat by J. Frank Martin,

Appeal from Orders are hereby dismissed by the District Court of Appeal, Second Appellate District, State of California. Respondents to recover costs on appeal.
Dated Jan. 7, 1947. Attested Mar. 10, 1947.
Filed Mar. 11, 1947. J. F. MORONEY, *County Clerk*. Ent. by HANNAH NAIR, *Deputy*.

Jr., Esq., and J. Harold Decker, Esq., and evidence
35 both oral and documentary, having been offered and received by the Court and the Court having submitted said matter for decision on the 29th day of October, 1945; and it appearing that notice of the time and place of the hearing on the petition of the said respondent, Annie L. Harris, for the probate of said document was duly given and published as provided by law and that no one appeared to contest the same except the contestant, Garland L. Brunton, and that the citation issued by the Clerk of said Court upon said contestant's written grounds of opposition to the probate thereof was duly served and published as provided by law and that no one appeared pursuant to said citation except the respondent, Annie L. Harris; and said cause having been consolidated for trial and tried by the Court upon the stipulation of said parties with the contest by Annie L. Harris, Ben Roy, and Charles F. Gayetty of the document offered for probate by the said Garland L. Brunton entitled "Power of Attorney", dated the 28th day of December, 1944; and the Court having made and filed herein its Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by the Court, as follows:

FIRST: That the respondent, Annie L. Harris, have judgment herein against the contestant, Garland L. Brunton, for her costs of suit incurred herein in the sum of $.....

36 SECOND: That Emily P. Sanborn died on the 4th day of February, 1945, while a resident of the County of Los Angeles, State of California, and leaving an estate in said County of Los Angeles, State of California, and that that certain document heretofore filed herein and offered for probate upon the petition of Annie L. Harris, which said document is entitled "Last Will", and dated the 12th day of June, 1942, be admitted to probate as the Last Will of the said deceased.

DATED: This 18th day of February, 1946.

HARRY R. ARCHBALD
Judge

GRM

37 (Affidavit of Service by Mail—1013a, C. C. P.)

State of California }
County of Los Angeles } ss.

J. HAROLD DECKER, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 628 Title Ins. Bldg., 433 S. Spring St. that on the 1st day of February, 1946 affiant served the within ORDER ADMITTING WILL TO PROBATE on the Contestant in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said contestant at the office address of said attorney, as follows: "MARCUS, RABWIN & NASH, Attorneys at Law, 608 South Hill Street, Los Angeles, 14, California," and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorneys for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

38 J. HAROLD DECKER

Subscribed and sworn to before me this 1st day of February 1946.

(SEAL) DORIS E. SMITH
Notary Public in and for the County of Los Angeles, State of California
My Commission Expires Dec. 2, 1949
(File Endorsement Omitted)

39 In Superior Court of Los Angeles County

Letters of Administration With-Will-Annexed—filed April 1, 1947

State of California }
County of Los Angeles } ss.:

THE LAST WILL OF EMILY P. SANBORN, Deceased, having been proved in the Superior Court of the State of California, in and for the County of Los Angeles, ANNIE L. HARRIS, is hereby appointed Administratrix with-the-will-annexed.

WITNESS, J. F. MORONEY, Clerk of the Superior Court of the County of Los Angeles, with the seal of the Court affixed, the 1 day of Apr., 1947.

By order of the Court.
(SEAL) J. F. MORONEY, *County Clerk*
By MARIE MCCARTHY, *Deputy*

State of California }
County of ~~Los Angeles~~ } ss.
Sacramento

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully perform according to law the duties of Administratrix with-the-will-annexed of the Estate of EMILY P. SANBORN, Deceased.

ANNIE L. HARRIS

40 Subscribed and sworn to before me this 28 day of March 1947.

(SEAL) J W S BUTLER
Notary Public in and for the County of ~~Los Angeles~~, State of California Sacramento

(File Endorsement Omitted)

41 In Superior Court of Los Angeles County

Affidavit of Publication of Notice to Creditors and Notice to Creditors—Filed May 11, 1945

State of California }
County of Los Angeles } ss.:

G. ARTZ, of the County of Los Angles, State of California, being duly sworn, makes oath and says;

That I am, and at all times herein mentioned was a citizen of the United States of America, over the age of eighteen years and not a party to nor interested in the above entitled matter; that I am the principal clerk of the printer and publisher of

THE LOS ANGELES DAILY JOURNAL AND THE LOS ANGELES NEWS: that said newspaper is a newspaper of general circulation printed and published daily, except Sundays, in the City of and County of Los Angeles; that the Notice to Creditors in the above entitled matter of which the annexed is a

true printed copy was published in said newspaper on the following days:

April 20, 27,
May 4, 11,
All in the year 1945.
First publication April 20, 1945.

G. ARTZ

42 Subscribed and sworn to before me this 11th day of May, 1945.

(SEAL) ALICE A. HILL
Notary Public in and for said County and State

Notice to Creditors

Notice is hereby given to creditors having claims against the said decedent to file said claims in the office of the clerk of the aforesaid court or to present them to the undersigned at the office of J. HAROLD DECKER and J. FRANK MARTIN, JR., 433 So. Spring St., in the City of Los Angeles, 13, in the aforesaid County, which latter office is the place of business of the undersigned in all matters pertaining to said estate. Such claims with the necessary vouchers must be filed or presented as aforesaid within six months after the first publication of this notice.

Dated April 19, 1945.

ANNIE L. HARRIS

Special Administratrix with general powers of the Etate of said decedent.

J. HAROLD DECKER and J. FRANK MARTIN, JR., 433 So. Spring St., Los Angeles 13, Calif., Atty. for Special Administratrix.

(18104 Fri.) Apr. 20-May 11

43 (File Endorsement Omitted)

44 In the Superior Court in and for the County of Los Angeles

(Title Omitted)

Notice of Appeal—Filed June 28, 1948

To: The Clerk of the above-entitled Court, to the United States of America, Legatee under the Last Will of Emily P. Sanborn, Deceased, and to James M. Carter, United States Attorney:

YOU WILL PLEASE TAKE NOTICE that the following heirs of the above-named decedent, to wit: Charles F. Gayetty, Annie L. Harris, George E. Breece, Ben Roy, Gertrude Bar-

ron, Margelia Gile Bernard, Elteen Knowles, Ralph Thibault, Glenn Thibault, Angelia Nichols, Edna L. King, Ferne L. Thibideau, Leona M. Dickinson, Edith M. Dickinson, Geneva Gile Fuller, Herman Gile, Harold Gile, Floyd Gile, Sherman Gile, Earland Gile, Rena Gile, George Gile, Chester Gile and La Forest Gile, hereby appeal to the Supreme Court of the State of California from that portion of the Decree of Distribution entered herein in Department 4 of the above-entitled Court on the 11th day of May, 1948, which reads as follows, to wit:

"To the United States of America, cash representing monies received as net income from real property and conversion values of real property sold in these pro-
45 ceedings in the amount of $12,689.78; United States Savings Bonds, Series E. Certificate Nos. L5228126E, Q12501095E, Q12501096E, L6122862E, L6122861E, Q14911609E, Q14911610E, Q14911611E, Q14911612E, L6886015E, L6886016E, L8664802E, L8664801E, C13581197E, L18778357E, L18778356E, L25541058E, L25541059E, L34770404E, L34770403E, C35637031E, C44034049E, C5851954E. C58515955E, C65940052E, C65940051E; Lots Number three (3) and four (4), South half (S½) of Northwest Quarter (NW¼) and Northeast Quarter (NE¼) of Southwest Quarter (SW¼) of Section Five (5), Township Three (3) North, Range Sixteen (16) West, S. B. B. & M., and Southeast Quarter (SE¼) of Northeast Quarter (NE¼) and East Half (E½) of Southeast Quarter (SE¼) of Section Six (6), Township Three (3) North, Range Sixteen (16) West, S. B. B. & M., County of Los Angeles, State of California, subject to: (1) Oil and Gas Lease to J. H. Reavis, dated November 10, 1939, recorded August 6, 1940, in Book 17764, page 24, Official Records of Los Angeles County, as modified by Modification of Oil and Gas Lease dated July 31, 1940, recorded August 6, 1940, in Book 17756, page 59, Official Records of Los Angeles County, (2) Mineral Deed of One per cent (1%) to Willis Sargent dated May 16, 1941, recorded May 10, 1941, in Book 18469, Page 27, Official Records of Los Angeles County; an amount equal to 92.45 per cent of all monies hereafter received as refunds of Federal and California income taxes paid by the estate."

46 Dated: June 28, 1948.

J. Frank Martin, Jr. and
J. Harold Decker
By J. Harold Decker
Attorneys for Appellants

47 (AFFIDAVIT OF SERVICE BY MAIL—1013a, C. C. P.)

State of California }
County of Los Angeles } ss.:

M. E. BUCHANAN, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 650 Subway Terminal Building, Los Angeles 13 California; that on the 28th day of June, 1948, affiant served the within NOTICE OF APPEAL on the Legatee United States of America in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said at the residence/office address of said attorney, as follows:

"James M. Carter, United States Attorney, 651 Federal Building, Los Angeles 12, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California," where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

M. E. BUCHANAN

48 Subscribed and sworn to before me this 28th day of June 1948.

(SEAL) JOYCE B. BALDWIN
Notary Public in and for the County of Los Angeles, State of California

(File Endorsement Omitted)

49 In Superior Court of Los Angeles County

Notice by Appellants to Clerk of Trial Court to Prepare Clerk's Transcript on Appeal—Filed July 8, 1948

To the Clerk of the Above Entitled Court:

Will you kindly prepare a transcript for use on appeal in the above entitled action containing the following papers:

1. Petition of Annie L. Harris for the probate of Will of the above named decedent, which said Will is dated the 12th day of June, 1942.

2. The Last Will of said decedent dated the 12th day of June, 1942.

3. The Notice of Hearing of said petition for probate of said Will.
4. Affidavit of publication of said Notice of Hearing of said petition for probate of said Will.
5. Order admitting said Will to probate.
6. Letters of Administration with the Will Annexed issued to Annie L. Harris.
7. Affidavit showing publication of Notice to Creditors.
8. Petition for Distribution.
9. Notice of Heating of Petition for Distribution.
10. Affidavit showing posting of said notice of said hearing of Petition for Distribution.
50 11. Special Notice of Hearing of Petition for Distribution.
12. Affidavit showing mailing of said Special Notice of Hearing of Petition for Distribution.
13. Decree of Distribution.

Dated: July 7, 1948.

J. HAROLD DECKER and
J. FRANK MARTIN, JR.
By J. HAROLD DECKER
Attorneys for Appellants

51 (AFFIDAVIT OF SERVICE BY MAIL—1013a, C. C. P.)

State of California }
County of Los Angeles } ss.:

M. E. BUCHANAN, being first duly sworn, says? That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business residence address is: 650 Subway Terminal Bldg., Los Angeles 13, California; that on the 8th day of July, 1948, affiant served the within NOTICE TO CLERK on the United States Attorney in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said
at the residence/office address of said attorney, as follows: "James M. Carter, United States Attorney, 600 Federal Bldg., Los Angeles, California," and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or/and there is a regular communication by mail between the place of mailing and the place so addressed.

M. E. BUCHANAN

52 Subscribed and sworn to before me this 8th day of July 1948.

JOYCE B. BALDWIN

(Seal) *Notary Public in and for the County of Los Angeles, State of California*

(File Endorsement Omitted)

53 In Superior Court of Los Angeles County

Second Petition for Probate of Will —Filed March 23, 1945

To the Superior Court of the County of Los Angeles, State of California:

The petition of ANNIE L. HARRIS of the County of Sacramento, State of California, respectfully states:

1. That EMILY P. SANBORN died on or about the 4th day of February, 1945, at Los Angeles.

2. That said deceased at the time of her death was a resident of the County of Los Angeles, State of California, and left property in the County of Los Angeles, State of California.

3. That the character and estimated value of the property of said estate, and the probable annual income therefrom, so far as known to your petitioner, are as follows: Real property with the approximate annual income of $1600.00. Personal property, stocks, bonds, cash, etc. $6000.00.

4. That said deceased left a Will bearing date the 12th day of June, 1942, which your petitioner alleges to be the last Will of said deceased, and which is presented herewith; that a copy of said will is annexed to this petition, marked Exhibit "A".

5. That Willis Sargent named in said Will as executor thereof, declines to act as such executor and his renunciation is filed herewith.

6. That the names, ages and residences of the
54 devisees and legatees named in the said Will of deceased are as follows:

Name	*Age*	*Residence (Street and City)*
United States of America.		

7. That the names, ages and residences of the heirs at law of said deceased, so far as known to your petitioner, are as follows:

Name:	*Relationship*	*Age*	*Residence (Street and City)*
Annie L. Harris,	niece,	over 21	2542 Sacramento Blvd. Sacramento, Calif.
Ben Roy,	nephew,	over 21	611 West 9th Street Chico, California
Merle Gile,	nephew,	over 21	Fayette, Maine
Gertrude Barron,	niece,	over 21	Fayette, Maine
Charles F. Gayetty,	grand-nephew,	over 21	1920 Lockwood Ave. Los Angeles, Cal.
George E. Breece,	grand-nephew,	over 21	c/o Fox-Senator Theater Vallejo, Cal.
Edna L. King,	grand-niece,	over 21	Pherham, Maine
Loretta A. Dickinson,	grand-niece,	over 21	R. F. D. #1, Washburn, Maine
Edith M. Dickinson,	grand-niece,	over 21	R. F. D. #4, Caribou, Maine
Leona M. Dickinson,	grand-niece,	over 21	R. F. D. #1, Washburn, Maine
Ferne L. Thibideau,	grand-niece,	over 21	Perham, Maine
Angelia Nichols,	grand-niece,	over 21	Presque Isle, Maine

55

Name:	*Relationship*	*Age*	*Residence (Street and City)*
Elteen Knowles,	grand-niece,	over 21	R. F. D. #1, Mars Hill, Maine

Name:	*Relationship*	*Age*	*Residence (Street and City)*
Ralph Thibault,	grand-nephew,	over 21	6836 Hawley St., Lockwood Garden's Annex, Oakland, California.
Herman Gile,	grand-nephew,	over 21	Wayne, Maine
Geneva Gile Fuller,	grand-niece,	over 21	Mt. Vernon, Maine
Harold Gile,	grand-nephew,	over 21	Livermore Falls, Maine
Floyd Gile,	grand-nephew,	over 21	Livermore Falls, Maine
Margelia Gile Benard,	grand-niece,	over 21	Pownal, Maine
Hazel Gile Farington,	grand-niece,	over 21	Fayette, Maine
Chester Gile,	grand-nephew,	over 21	Wayne, Maine
Ralph Gile,	grand-nephew,	over 21	Fayette, Maine
George Gile,	grand-nephew,	over 21	Fayette, Maine
Laforest Gile,	grand-nephew,	over 21	Sabattiss, Maine
Wellington Gile,	grand-nephew,	over 21	North Monmouth, Maine
Bernard Gile,	grand-nephew,	over 21	North Monmouth, Maine
Sherman Gile,	grand-nephew,	over 21	156 Hanover St., Manchester, New Hampshire

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Earland Gile,	grand-nephew	over 21	301 Prospect Street Hawley, Penn.
Rena Gile,	grand-niece	over 21	73 Pine Street Lewiston, Maine
Glen Thibault,	great-grand-nephew	over 21	R. F. D. #4, Presque Isle, Maine

8. That at the time said Will was executed, to-wit, on the said 12th day of June, 1942, the testatrix was over the age of eighteen years, to-wit, of the age of 92 years, or thereabouts and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last Will, to dispose of all her estate.

9. That said Will is in writing signed by the said testatrix and attested by two subscribing witnesses. Your petitioner alleges that said testatrix acknowledged the Will in the presence of said witnesses, present at the same time, and that said witnesses signed the said Will at the request of said testatrix and in the presence of said testatrix, and your petitioner further alleges that said witnesses, at the time of attesting the execution of said Will, were competent.

10. That said Will does not contain a residuary clause and therefore does not dispose of all of decedent's estate, to wit; certain personal property; that you petitioner is a natural heir of decedent and is therefore entitled to succeed to a portion of said estate.

57 11. That your petitioner hereby declares her hostility to Item III of said Will and further declares that at the appropriate time and by appropriate proceedings, she will object to distribution of said estate under the terms of said Item III on the ground that a testamentary disposition may not be made to the UNITED STATES OF AMERICA under the provisions of Section 27 of the Probate Code of the State of California; that this petition is presented for the purpose of placing said Will before this Court so that at the appropriate time, the validity or invalidity of said Item III thereof may be properly determined.

Wherefore, your petitioner prays that the said Will may be admitted to Probate, and that Letters of Administration with-the-will-annexed be issued to your petitioner, and that for that purpose a time be appointed for proving said Will, and that due notice thereof be given according to law, and that all necessary and proper orders may be made in the premises.

Dated: March 23, 1945.

ANNIE L. HARRIS

(File Endorsement Omitted)

In Superior Court of Los Angeles County

Affidavit of Publication of Notice of Hearing of Petition for Probate of Will and Notice of Hearing—Filed April 6, 1945

State of California }
County of Los Angeles } ss.:

G. ARTZ, of the County of Los Angeles, State of California, being duly sworn, makes oath and says;

That I am, and at all times herein mentioned was a citizen of the United States of America, over the age of eighteen years and not a party to nor interested in the above entitled matter; that I am the principal clerk of the printer and publisher of

THE LOS ANGELES DAILY JOURNAL
AND THE LOS ANGELES NEWS;

that said newspaper is a newspaper of general circulation printed and published daily, except Sundays, in the City of and County of Los Angeles; that the NOTICE OF HEARING OF PETITION FOR PROBATE OF WILL, of which the annexed is a true printed copy was published in said newspaper on the following days:

March 27, 28, 29, 30, 31,
April 2, 3, 4, 5, 6,
All in the year 1945.

G. ARTZ

Subscribed and sworn to before me this 6th day of April, 1945.

ALICE A. HILL
Notary Public in and for said County and State

(Seal)

Notice of Hearing

Notice is hereby given that the petition of Annie L. Harris, for the Probate of the Will of the above-named deceased, and for the issuance of Letters of Administration with Will Annexed thereon to the petitioner, will be heard at 9:30 o'clock A. M., on April 9, 1945, at the court room of Department 24, of the Superior Court of the State of California, in and for the County of Los Angeles.

Dated: March 23, 1945.

J. F. MORONEY
County Clerk
By H. L. DOYLE
Deputy

J. HAROLD DECKER and J. FRANK MARTIN, JR.
433 South Spring Street, Los Angeles, Calif.
Attorneys for Petitioner
(16345) Mar. 27 Apr. 6

(File Endorsement Omitted)

61 In Superior Court of Los Angeles County

Affidavit of Service of Notice of Time for Probate of Will, Etc., by Mailing and Notice of Hearing of Petition for Probate of Will—Filed March 28, 1945

State of California }
County of Los Angeles } ss.:

G. ARTZ, being duly sworn, deposes and says: that the business address of affiant is 121 North Broadway, in the City of Los Angeles, in the County of Los Angeles, State of California; that she was, at the time of the services hereinafter referred to, a citizen of the United States, a resident of the County where the mailing herein referred to occurred, over the age of eighteen years and not interested in the above estate; that on the 27 day of March, 1945 affiant deposited in the United States Mail in said City, in separate envelopes, a true copy of the notice attached hereto, of the time and place appointed for the hearing of the petition for the probate of the will of the aforesaid decedent; that said envelopes were addressed as follows:

United States of America	Washington, D. C.
Annie L. Harris	2542 Sacramento Blvd. Sacramento, California
Ben Roy	611 West 9th Street Chico, California
Merle Gile	Fayette, Maine

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Gertrude Barron	Fayette, Maine
Charles F. Gayetty	1920 Lockwood Ave. Los Angeles, California
George E. Breece	c/o Fox-Senator Theater Vallejo, California
Edna L. King	Perham, Maine
Loretta A. Dickinson	R.F.D. #1 Washburn, Maine
Edith M. Dickinson	R.F.D. #4 Caribou, Maine
Leona M. Dickinson	R.F.D. #1 Washburn, Maine
Ferne L. Thibideau	Perham, Maine

Angelia Nichols	Presque Isle, Maine
Elteen Knowles	R.F.D. #1 Mars Hill, Maine
Ralph Thibault	6836 Hawley St. Lockwood Garden's Annex Oakland, California
Herman Gile	Wayne, Maine
Geneva Gile Fuller	Mt. Vernon, Maine
Harold Gile	Livermore Falls, Maine
Floyd Gile	Livermore Falls, Maine
Margelia Gile Benard	Pownal, Maine
Hazel Gile Farington	Fayette, Maine
Chester Gile	Wayne, Maine
Ralph Gile	Fayette, Maine
George Gile	Fayette, Maine
Laforest Gile	Sabattiss, Maine
Wellington Gile	North Monmouth, Maine

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Bernard Gile	North Monmouth, Maine
Sherman Gile	156 Hanover St. Manchester, New Hampshire
Earland Gile	301 Prospect St. Hawley, Pennsylvania
Rena Gile	73 Pine St., Lewiston, Maine
Glen Thibault	R.F.D. #4 Presque Isle, Maine

that each of said envelopes was sealed and deposited in the mail with the postage thereon fully prepaid; that at the time of deposit of the aforesaid envelopes addressed to places within the United States, its Territories, Possessions, Military and Naval Bases, there was delivery service by United States mail at the places so addressed; that at the time of deposit of the aforesaid envelopes addressed to all other places, there was regular communication by mail between said place of mailing and all said other places.

G. ARTZ

Subscribed and sworn to before me, this 27 day of March, 1945.

ALICE A. HILL

(Seal) *Notary Public in and for the County of Los Angeles, State of California*

64 (File Endorsement Omitted)

65 Clerk's Certificate to foregoing transcript omitted in printing

67 In Superior Court of Los Angeles County

Stipulation as to Record

WE HEREBY STIPULATE the foregoing certified record consisting of pages 1 to 64 inclusive, to be a full true and fair transcript, and that the papers in the said transcript are the papers, and all of the papers, used or considered in the determination of the matter appealed from herein.

Dated:

_____
Attorney for Appellant

_____
Attorney for Respondent

68 In the Superior Court of Los Angeles County

Judge's Certificate

I HEREBY CERTIFY the foregoing certified record consisting of pages 1 to 64 inclusive, to be a full, true and fair transcript, and that the papers in the said transcript are the papers, and all of the papers, used or considered on the hearing at the trial of the within cause in the determination of the judgment appealed from herein; and the same is hereby settled and allowed this 21 day of October, 1948.

S/ HAROLD B. JEFFERY
Judge of the Superior Court

69 *Clerk's Certificate*

No. 241228

State of California }
County of Los Angeles } ss.:

Notice of completion of the Clerk's Transcript on Appeal of the within proceeding having been mailed to the attorneys representing the appellant and the respondent, and no request for correction of the transcript on appeal having been filed, and the time for said filing having expired: Pursuant to Rule 8 (a) of the Rules on Appeal, I HEREBY CERTIFY the foregoing record consisting of 64 pages to be a full, true and fair transcript on appeal.

Dated:

EARL LIPPOLD, *County Clerk*
By_____*Deputy*

70 In Supreme Court of California

Order of Consolidation—Dec. 7, 1948

The following is a portion of the minutes of the Supreme Court of the State of California on December 7, 1948, at San Francisco:

"S. F. 17620—Estate of Burnison
L. A. 20816—Estate of Sanborn
Causes called and consolidated for purposes of argument.

* * * * * * * * * * *"

70-A In the Supreme Court of California

In Bank

L. A. No. 20816

(File Endorsement Omitted)

In the Matter of the Estate
of
EMILY P. SANBORN, Deceased.

ANNIE L. HARRIS,
PETITIONER AND APPELLANT,
CHARLES F. GAYETTY, GEORGE E. BREECE, BEN ROY, MERLE GILE, GERTRUDE BARRON, MARGELIA GILE BERNARD, ELTEEN KNOWLES, RALPH THIBAULT, GLEN THIBAULT, ANGELIA NICHOLS, EDNA L. KING, FERN L. THIBIDEAU, LEON M. DICKINSON, EDITH M. DICKINSON, GENEVA GILE FULLER, HERMAN GILE, HAROLD GILE, FLOYD GILE, SHERMAN GILE, ERLAND GILE, RENA GILE, GEORGE GILE, CHESTER GILE and LAFOREST GILE,
HEIRS AT LAW AND APPELLANTS,
VS.
UNITED STATES OF AMERICA,
CONTESTANT AND RESPONDENT.

Opinion—Filed March 22, 1949

Testatrix, a resident of Los Angeles, devised and bequeathed to the "United States of America" all her real property in this state and her Government bonds. The will contains no residuary clause so that in the event of the failure of such devise and bequest, such property would descend to the decedent's heirs at law under
71 the laws of succession. In the probate proceedings, the court ordered distribution of the mentioned

property in pursuance of the terms of the will. From the portions of the decree of final distribution accordingly entered in favor of the "United States of America," the heirs bring this appeal.

The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the Estate of Burnison, this day decided, ante p. 33. The only additional point here made relates to the pertinency of the Government's reference to two specific federal statutes as establishing the "authority of the United States to take by will." One is the Act of April 3, 1945 (59 Stats. 48, c. 51, sec. 4; 31 U. S. C. A. sec. 757), declaring that "the Treasurer of the United States * * * shall effect redemption" of "any direct obligation of the United States" (such as Government bonds) that "is bequeathed by will to the United States"; and the other is the Act of March 3, 1903 (32 Stats. 1112, c. 1007, sec. 1; 40 U. S. C. A. sec. 304), authorizing "the Secretary of the Treasury * * * to sell such lands as have been or may hereafter be acquired by
72 the United States by devise." However, such Congressional enactments, by their provision for the Government's disposition of such testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. (Estate of Burnison, *supra.*) Accordingly the objections of the heirs to the claims of the "United States of America" under the terms of the decedent's will must be sustained.

The portions of the decree here subject of appeal are reversed.

SPENCE, J.

WE CONCUR:
Gibson, C. J.
Shenk, J.
Carter, J.
Schauer, J.

I CONCUR IN THE JUDGMENT:
Edmonds, J.

I DISSENT:
Traynor, J.

73 In the Supreme Court of California

In Bank

Estate of SANBORN

Order Denying Petition for Stay of Remittitur—Filed April 25, 1949

Petition for stay of remittitur denied.

Dated: Apr. 25, 1949.

GIBSON
Chief Justice.

(File Endorsement Omitted)

74 Clerk's Certificate to foregoing transcript omitted in printing.

75 In the Supreme Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Petition for Appeal to the Supreme Court of the United States—Filed June 21, 1949

To: The Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States.

Now comes the United States of America, petitioner herein and states that on the twenty-second day of March, 1949, the Supreme Court of California entered judgment against it, holding that a bequest to it was void under Section 27 of the Probate Code of the State of California.

Petitioner, believing that the judgment of the Supreme Court of California incorrect, has applied to the Chief Justice of the Supreme Court of California for an allowance of the appeal, and it is informed that on June 14, 1949 the Chief Justice of the Supreme Court of California has refused to allow the appeal. Therefore it prays this
76 Court that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of the Supreme Court of California and that a transcript of the record of this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of this Court to entertain an appeal in this case.

Dated June 15, 1949.

UNITED STATES OF AMERICA
By PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

77 In the Supreme Court of the United States

(Title Omitted)

(File Endorsement Omitted)

Assignment of Errors and Prayer for Reversal—Filed June 21, 1949

Now comes the United States of America, respondent in the above-entitled cause, and in connection with its appeal herein files the following assignment of errors upon which it will rely in its prosecution of said appeal to the Supreme Court of the United States from the judgment of the Supreme Court of California dated March 22, 1949. The Supreme Court of California erred:

1. In holding that Section 27 of the Probate Code of California, barring the United States from receiving testamentary gifts under wills of California domiciliaries, does not infringe the inherent sovereign power of the United States derived from the Constitution.

78 2. In holding that Section 27 does not effect an unconstitutional discrimination against the United States.

3. In holding that there is no constitutional requirement that the state allow the United States to take under a will.

4. In holding that a state's power to control the descent of property is free from any constitutional limitation.

5. In holding that the entire matter of the right of testamentary disposition is within the control of the state having jurisdiction of the property in question.

WHEREFORE, respondent United States of America prays that said judgment of March 22, 1949 be reversed.

Dated: June 15, 1949.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

79 In the Supreme Court of the United States

(Title Omitted)

Order Allowing Appeal—Filed June 21, 1949

United States of America, having prayed for an allowance of an appeal to the Supreme Court of the United States from the final judgment rendered by the Supreme Court of the State of California in the above-entitled cause and having presented and filed its petition for appeal, assignments of error and prayer for reversal and a statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is now ordered that an appeal be and the same is hereby allowed in the above-entitled cause as provided by law, from the Supreme Court of California to the Supreme Court of the United States; and

80 It is further ordered that the Clerk of the Supreme Court of California prepare and certify a transcript of the record in this cause, as may be designated by the appellant and appellees, and transmit the same to the Supreme Court of the United States so that the Clerk of said Court shall have said record within sixty days from this date.

Dated: June 16, 1949.

FRED M. VINSON

Chief Justice of the United States

81 Citation in usual form, filed June 21, 1949, omitted in printing.

83 In the Supreme Court of California

In Bank

(Title Omitted)

(File Endorsement Omitted)

Praecipe for Transcript of Record—Filed June 21, 1949

To the Clerk of the Supreme Court of the State of California.

Sir:

You are hereby requested to prepare a transcript of the record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following:

1. Clerk's transcript on appeal as filed in the Supreme Court of the State of California.
2. Proceedings in the Supreme Court of the State of California.
3. Petition for appeal.
4. Assignments of errors and prayer for reversal.
84 5. Statement of jurisdiction on appeal.
6. Order allowing appeal.
7. Citation on appeal.
8. Appellant's notice of appeal and statement directing appellees' attention to paragraph 3, rule 12, Rules of the Supreme Court of the United States.
9. This praecipe.
10. Appellees' acknowledgment of service of preceding documents designated as numbers 3 to 9 inclusive.
11. All statements and motions required and permitted to be filed under rule 12 of the Rules of the Supreme Court of the United States.

Dated: June 16, 1949.

PHILIP B. PERLMAN
Philip B. Perlman
Solicitor General

85 In the Supreme Court of the United States

Statement of Points Relied Upon and Designation of Record for Printing—Filed Oct. 11, 1949

Pursuant to Rule 13, paragraph 9 of this Court, the appellant states that it intends to rely on all of the points in its assignment of errors.

The appellant deems the entire record as designated in its praecipe for transcript of record heretofore filed in the Supreme Court of the State of California necessary for the consideration of the points relied upon.

THE UNITED STATES OF AMERICA
PHILIP B. PERLMAN
Solicitor General

City of Washington,
District of Columbia, ss.

VIOLA A. BARTZ, being duly sworn, deposes and says that there has this day been transmitted by registered letter to J. Harold Decker, attorney of record for the appellees in the above entitled cause, copies of appellant's Statement of

Points Relied Upon and Designation of Record for Printing, this day duly filed with the Clerk of this Court.

VIOLA A. BARTZ

Subscribed and sworn to before me this 10th day of October 1949.

GLADYS E. McGAFFEY
Notary Public, D. C.

(Seal)

86 Supreme Court of the United States

Order Noting Probable Jurisdiction—October 10, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

☆ U. S. GOVERNMENT PRINTING OFFICE: 850888 NO. 10—1949

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOE BURNISON, PHIL KATZ, AS PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO, APPELLEES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The date of the judgment entered by the Supreme Court of California is March 22, 1949. The petition for appeal is presented to the Supreme Court of the United States herewith, to wit, on June 15, 1949.

JURISDICTION

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the decision in this case is conferred by Section 1257(2) of Title 28 U. S. C., as codified by the act approved June 25, 1948, effective September 1, 1948. The following cases are believed to sustain

the jurisdiction of the Supreme Court: *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U. S. 285; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U. S. 261; *Standard Oil Co. of California* v. *Johnson, Treasurer of the State of California,* 316 U. S. 481; *United States* v. *Klein,* 303 U. S. 276.

STATE STATUTE INVOLVED

The statute of the State of California which was held to be valid but which the appellant contended was unconstitutional is the Probate Code of California, particularly Section 27, which provides as follows:

> *Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanitorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute.

THE ISSUES AND THE RULING BELOW

Upon his death on February 23, 1946, Gust Burnison, also called Gustave Burnison, a resident of San Francisco, California, left a holographic will, in which he stated: "This is my last will & wish that I give all I own and possess to the United States Government, U. S. A. The beneficiary shall be executor. My body shall be cremated after death"

(Tr.[1] 2). The Superior Court of the State of California in and for the City and County of San Francisco admitted this document as the last will and testament of the decedent on the petition of Phil C. Katz, Public Administrator of the City and County of San Francisco and appointed him as administrator with the will annexed (Tr. 8). The value of personal property left by the decedent was appraised at $22,668.70 (Tr. 9-17).

The heirs-at-law, three brothers, one sister and thirteen nieces and nephews, petitioned for distribution of the whole estate to themselves on the ground that "The United States of America is not authorized by statute or otherwise to take under a will" executed in California by a California resident (Tr. 18, 20), that "the United States of America is not authorized to take by will under the provisions of Section 27, Probate Code of the State of California or under any other statute or law of the State of California" (Tr. 21) and hence that the bequest to the United States was void (Tr. 21). In opposition to the heirs' petition, the United States of America urged that the Government was a person or corporation authorized to take by will pursuant to Section 27. The Superior Court sustained the Government's objections and dismissed the petition (Tr. 31).

The appeal of the heirs to the Supreme Court of California was referred for hearing and decision to the District Court of Appeals, State of California, First Appellate District, as authorized by Article VI, Section 4c of the Constitution of the

[1] References, unless otherwise noted, will be to the pages in the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California and which is included in the transcript certified to this Court.

State of California. In the District Court of Appeals, the United States urged *inter alia* that if Section 27 of the Probate Code were construed as invalidating the bequest to the United States, serious constitutional questions would arise. The District Court of Appeals, however, reversed the order of the Superior Court. 87 Adv. Cal. App. 310.[2] That court construed Section 27 as not sanctioning bequests or devises to the United States *eo nomine*. 87 Adv. Cal. App. at 312. It further stated that the contention of the United States as to constitutionality of the statute is answered by *Irving Trust Co.* v. *Day*, 314 U. S. 556, 87 Adv. Cal. App. at 313.

The United States, in its petition for a hearing by the Supreme Court of California, urged that if the state law should be construed as invalidating this bequest, it would violate the Federal Constitution. The Government contended that the statute would then effect an unlawful discrimination against the United States, and would infringe the inherent sovereign power of the United States, derived from the Constitution, to acquire property by will.

The Supreme Court of California sitting in bank reversed the order of the Superior Court, one judge dissenting, 33 Adv. Cal. 613. The court stated that the state has the exclusive power to designate those who may take property by descent and hence that "section 27 * * * prescribing 'who may take by will,' must be construed as determinative of the validity of the bequest here in question" (p. 615). It construed Section 27 as excluding the United States and all other states except California from

[2] Apparently through oversight, this case has been omitted from the bound volume of 87 California Appellate Reports.

among the eligible beneficiaries (p. 617). After citing and quoting from *United States* v. *Fox*, 94 U. S. 315 and *United States* v. *Perkins*, 163 U. S. 625, the California Supreme Court commented (p. 618):

> * * * And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A. L. R. 1093], wherein was sustained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra*, among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis in opinion) * * *

The Court continued (p. 618):

> The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, *supra*, and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as over ruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

The Court further stated (p. 619):

> * * * It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator had his domicil" effecting "a restriction as to who may be devisees or legatees." (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The appeal in this case presents the question whether a state may deny to the United States the right to receive a gift willed to it by a decedent domiciled in that state.

(a) There can be no question this date that the United States as a body politic established by the Constitution has the capacity, by virtue thereof, to receive voluntary bequests and devises, as an incident to that sovereignty. *Dickson* v. *United States*, 125 Mass. 311, 313-315. That power has as its source the same fountainhead, *i.e.*, the general right of sovereignty, as the powers, which the United States has been held to have despite the absence of an express constitutional provision, to enter contracts (*United States* v. *Maurice*, 2 Brock. 96, 109 (opinion by Chief Justice Marshall); *United*

States v. *Tingey*, 5 Pet. 115, 128 (opinion by Mr. Justice Story)), to sue in its own name (*Dugan* v. *United States*, 3 Wheat. 172, 181), to requisition property (*Kohl* v. *United States*, 91 U. S. 367), and to take security for debts to the United States. *United States* v. *Bradley*, 10 Pet. 343, 359; *United States* v. *Linn*, 15 Pet. 290, 311; *Neilson* v. *Lagow*, 12 How. 98, 107-108. "To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation." *United States* v. *Tingey*, 5 Pet. 115, 128.

The United States has long received testamentary gifts from decedents domiciled in virtually all states (cf. *Dickson* v. *United States*, 125 Mass. 311, 315); the sole exceptions are California in the present cases[3] and New York in regard to devises of realty (see *United States* v. *Fox*, 94 U. S. 315, discussed *infra*, p.). Since the earliest days of the Government, the Treasury Department has, in the exercise of this implied power, accepted these gifts without question.[4] Although Congress has never enacted a general statute authorizing the acceptance of testamentary bequests, it has in several statutes dealing with various aspects of such gifts, assumed the existence of the power in the United States to accept them. Thus, Congress

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[3] Prior to the present cases, the United States had received a number of bequests and devises under the wills of California domiciliaries.

[4] A bequest to the United States without limitation as to use goes into "Miscellaneous Receipts." A bequest to or for the use of a particular agency authorized by statute to receive testamentary gifts for specific purposes goes into a special fund "as * * * authorized by law."

has, by special legislation, authorized the acceptance of specific testamentary gifts willed to the United States for designated purposes. Act of August 10, 1846, c. 178, 9 Stat. 102 (Smithsonian Institution); Joint Resolution of June 22, 1938, c. 595, 52 Stat. 943 (home of the late Justice Holmes); Act of July 15, 1935, c. 381, 49 Stat. 481. It has authorized several agencies generally to receive testamentary gifts for specific purposes apparently for the purpose of encouraging such gifts. Act of March 3, 1865, c. 91, 13 Stat, 509, as amended by the Act of January 23, 1873, c. 51, 17 Stat. 417 (National Home for Disabled Volunteer Soldiers); Act of March 3, 1925, c. 423, 43 Stat. 1107, 2 U. S. C. 154 *et seq.* ("Library of Congress Trust Fund Board"); Title XI of the Second War Powers Act, 1942, c. 199, 56 Stat. 176, 183 (gifts for a particular war purpose);[5] cf. Act of June 25, 1910, c. 384, as amended, 36 Stat. 703, 736, 55 Stat. 868, 38 U. S. C. 17 *et seq.* (National Home for Disabled Volunteer Soldiers); *United States* v. *Stevens,* 302 U. S. 623; *National Home* v. *Wood,* 299 U. S. 211. And it has provided by legislation for the sale of land devised to the United States (32 Stat. 1112, 40 U. S. C. 304), for the disposition of bequests to the United States of United States bonds (59 Stat. 48, 31 U. S. C. 757e), and for the deduction of the value of bequests and devises to

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[5] See, in addition, the following statutes authorizing acceptance of testamentary gifts for purposes stated: 5 U.S.C. 393 (Post Office Department Library); 5 U.S.C. 721 (Civil Service employees generally); 16 U.S.C. 715d (sanctuaries for migratory birds); 20 U.S.C. 55, 74(b) (Smithsonian Institution and National Gallery of Art); 22 U.S.C. 809 (Foreign Service); 24 U.S.C. 181 (St. Elizabeth's Hospital); 34 U.S.C. 1115, 1116, 1118 (Naval Academy and its Museum); 38 U.S.C. 14 (hospitalized disabled veterans); 42 U.S.C. 219 (Public Health Service); 44 U.S.C. 300cc (National Archives).

the United States from the gross estate in the computation of Federal inheritance tax (26 U. S. C. 812(d)).

(b) While the Supreme Court of California recognized that the United States has the capacity, incident to its sovereignty to receive such gifts (33 Adv. Cal. at 619) it held that the right of the United States to receive these gifts was subject to the state's power over the devolution of property. This holding was predicated on broad generalities in the decisions of this Court (*United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *Irving Trust Co.* v. *Day*, 314 U. S. 556) to the effect that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction" (314 U. S. at 562). In relying on these generalities, however, the California Supreme Court improperly failed to give any weight to the fact that a state's power over the descent of property is subject to the limitations and protections afforded by the Constitution, for it is "under our Constitution [that] the devolution of property is determined by the laws of the several States." *Snyder* v. *Bettman*, 190 U. S. 249, 252. It is clear, for example, that a tax imposed on the descent of property may involve such an arbitrary or unreasonable exercise of the power as to violate the equal protection clause of the Fourteenth Amendment. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Campbell* v. *California*, 200 U. S. 87, 94; *Keeney* v. *New York*, 222 U. S. 525, 535; *Maxwell* v. *Bugbee*, 250 U. S. 525, 540; *Stebbens* v. *Riley*, 268 U. S. 137, 142. And the denial by a state to residents in other states of the right to take legacies

which it granted to its own citizens may violate the privileges and immunities clause of the Fourteenth Amendment. *Maxwell* v. *Bugbee*, 250 U. S. 525, 543-544 (Mr. Justice Holmes dissenting).

That the power of the states over the descent of property is limited by the Constitution is strikingly demonstrated in *Clark* v. *Allen*, 331 U. S. 503. There, this Court sustained the right of an alien enemy, whose interest had become vested in the Alien Property Custodian, to a devise of realty under Article IV of the Treaty of Friendship with Germany (44 Stat. 2132), notwithstanding the inconsistent provisions of the California law. The Court noted that since "the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them" (331 U. S. at 508). It further commented (at 517):

> Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham* [100 U. S. 483, 488-490]. Then the state policy must give way.[6]

An analogous limitation likewise stemming from Article V of the Constitution is applicable here. The United States receives testamentary gifts as an incident to its sovereignty established by the Constitution and hence a state policy which purports to invalidate these gifts, and so is inconsistent with the sovereignty of the United States must

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[6] Cf. *Sunderland* v. *United States*, 268 U. S. 226, 232-233; see, also, *Stebbins* v. *Riley*, 268 U. S. 137, 140.

likewise, we submit, give way, for under Article VI, "the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Testa* v. *Katt*, 330 U. S. 386, 391.

(c) *United States* v. *Fox*, 94 U. S. 315, in which this Court invalidated a devise of realty to the United States which was not sanctioned by the law of New York, the state in which the realty was located, is, we submit, no longer controlling. As we have shown, *supra*, p. —, this Court's subsequent decisions recognizing constitutional limitations on the power of the states over the descent of property undercut the broad ground of the *Fox* decision that such state power is absolute and exclusive. Furthermore, the *Fox* decision was of questionable soundness even at the time it was rendered. In the first place, the Court there considered the problem raised to be the broad question whether the devolution of property within a state was governed by state or federal law. But the primary power of the states to determine who shall take testamentary gifts was not disputed. The United States assumed such power in the states, and urged, as it does here, that the United States may, as an incident to its sovereignty, take testamentary gifts independently of the provisions of state law. In the second place, the Court regarded as applicable the English Statute of Wills and the Statute of 32 Hen. VIII which, it noted, had been carried over into New York law. But in so doing, the Court disregarded the further principle of English common law that bequests for the benefit of the country are valid (see, *e.g.*, *Newland* v. *Attorney General*,

3 Meriv. 684; *Nightingale* v. *Coulburn*, 5 Hare 484, 2 Phillips 594; *Ashton* v. *Langdale*, 15 Jur. 868) and did not attempt to reconcile these principles in the light of our dual system of state and federal sovereignties with the federal government supreme by virtue of Article VI of the Constitution. In these circumstances, this Court should, we submit, overrule the *Fox* case, just as it has already overruled *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, rendered contemporaneously with *Fox*. In the *Doyle* case, this Court had affirmed the states' power to require a foreign corporation to waive its right to resort to federal courts as a condition of admission into the state, but it subsequently overruled that decision "because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign power, is subject to the limitations of the supreme fundamental law." *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532-533.[1]

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[1] *United States* v. *Perkins*, 163 U. S. 625, also relied upon by the California Supreme Court, is distinguishable. In that case, this Court (citing the *Fox* case) sustained the power of the states to tax a bequest to the United States on the stated ground that the states, in the exercise of their power over the descent of property may attach any condition to their sanctioning of such devolution. Subsequent decisions, however, have explained the *Perkins* case as also resting on the independent power of the states to tax the transfer of property. *Knowlton* v. *Moore*, 178 U. S. 41, 57-58; *Snyder* v. *Bettman*, 190 U. S. 249, 252. In these later cases, this Court rejected the contention that the authority to lay a succession tax arose solely from the power to regulate the descent of property. It held, despite the intergovernmental immunity doctrine then in full bloom, that the United States, along with the states, has power to tax transfers of property and accordingly sustained a tax levied by the United States on a bequest to a state. See, also, *Greiner* v. *Lewellyn*, 258 U. S. 384 (sustaining a federal tax on a bequest of municipal bonds). As thus explained by this Court, the *Perkins* case clearly provides no support, independently of the *Fox* case, for the holdings of the California

2. The appeal will present the further substantial question whether Section 27 of the Probate Code, as construed by the Supreme Court of California, has a discriminatory effect against the United States in violation of Article VI of the Constitution. As construed by the California Supreme Court, Section 27 forbids the United States and any state, other than the State of California, from taking testamentary gifts under the wills of Californian domiciliaries. The California Court's holding that this statute, as thus construed, did not unconstitutionally discriminate against the United States was predicated on the ground that the states have exclusive power to control the devolution of property, free from constitutional limitations. But, as we have shown *supra*, p. —, the United States, as established by the Constitution, may take testamentary gifts as an inherent aspect of the sovereignty created thereby and a state's power over the devolution of property is subject to constitutional limitations, including the supremacy clause of Article VI. In these circumstances, since the sovereign power of the United States is of at least equal dignity and character as that of California (cf. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 227), Section 27, by denying the right to the United States to receive testamentary gifts under wills of California domiciliaries and granting such right to the State of California discriminates against the United States in violation of the prohibition of Article VI against discrimination against rights granted by the Constitution and laws passed pursuant thereto. *Testa* v. *Katt*, 330

Supreme Court. *Irving Trust Co.* v. *Day*, 314 U. S. 556, the third case principally relied on by the California Court, is irrelevant here; it did not involve any questions as to the validity of testamentary gifts to the United States.

U. S. 386; *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230; *Mondou* v. *New York, N.H., & H.R. Co.*, 223 U. S. 57-58; *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U. S. 211, 222; *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543, 546-547 (C.A. 8). The discrimination here is particularly shocking since the right involved is that of the United States stemming directly from the Constitution in contrast to the usual situation where the right is that of a private individual flowing from an act of Congress passed in the exercise of power vested in it by the Constitution.[8]

There are appended hereto copies of the opinion of the Supreme Court of California and of the District Court of Appeals, State of California, First Appellate District.

THE UNITED STATES OF AMERICA,
BY: PHILIP B. PERLMAN,
Solicitor General.

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[8] The fact that Section 27 also declares states, other than the State of California, ineligible to receive testamentary gifts is immaterial, for the supremacy clause is not applicable in matters concerning the relationship of states *inter se*. Cf. *Testa* v. *Katt*, 330 U. S. 386, 393-394.

OPINION OF THE SUPREME COURT

SPENCE, J.—This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and 13 nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States Government U.S.A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident" thereof, that the testamentary "bequest" is therefore "void", and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

[1] At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*In re Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460]; see, also, *Estate of Carpenter*, 172 Cal. 268, 269 [156 P. 464, L.R.A. 1916E 498]; *Estate of Wilkinson*, 113 Cal. App. 645, 646 [298 P. 1037].) The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. (*Estate of Durlewanger*, 41 Cal. App. 2d 750, 752 [107 P. 2d 477]; *Estate of Bauer*, 51 Cal. App. 2d 636, 637 [124 P. 2d 630].) [2] As a necessary postulate of this proposition, it follows that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. (*In re Wilmerding*, 117 Cal. 281, 284 [49 P. 181].)

[3] Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by the law of his domicile. (*Estate of Sloan*, 7 Cal. App. 2d 319, 333-334 [46 P. 2d 1007].) It was early recognized in decisions of this state—as *Estate of Apple*, 66 Cal. 432, 436-437 [6 P. 7]; *Whitney* v. *Dodge*, 105 Cal. 192, 197-198 [38 P. 636]; *Estate of Lathrop*, 165 Cal. 243, 247 [131 P. 752]—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "who may take by will," must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[4] The government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a "testamentary disposition," as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification (23 Cal. Jur. §109, p. 730; *Taylor* v. *Lundblade*, 43 Cal. App. 2d 638, 641 [111 P. 2d 344]; *Gayer* v. *Whelen*, 59 Cal. App. 2d 255, 262 [138 P. 2d 763]), and the government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as "the state," the drafts-

men of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the Legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." (*United States* v. *Cooper Corporation*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], citing *Davis* v. *Pringle*, 268 U. S. 315, 318 [45 S. Ct. 549, 69 L. Ed. 974].) Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. (23 Cal. Jur. § 110, p. 732; *People* v. *One 1940 Chrysler Coupe*, 48 Cal. App. 2d 546, 549 [120 P. 2d 117].) Here the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. (Amendments to the codes, 1873-74, p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept . . . any gift, bequest and devise . . ." (Stats. 1881, p. 2.) In 1903, section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. (Stats. 1903, p. 258.) In 1905, the section was further amended to permit "counties" and

"municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises (Stats. 1905, p. 605), and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 1275.) Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for 24 years. Then in 1931, when, upon adoption of the Probate Code, the Legislature added to the list of entities privileged to take under a California will "the state" in connection with "counties" and "municipal corporations," it could not have meant any state other than California.

The case of *United States v. Fox*, 94 U. S. 315 [24 L. Ed. 192], is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York provided that a devise of lands might be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question presented for consideration was "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court of the United States declared (as the state court had, 52 N. Y. 530, 534 [11 Am. Rep. 751]) that "this question" was "to be determined by the laws of [New York]." (94 U. S. 320.) Then the court, speaking through Mr. Justice Field, stated at page 321 as follows: "The term 'person'

as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. . . . A devise to the United States of real property situated in that State [New York], is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of a testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of *United States* v. *Perkins*, 163 U. S. 625 [16 S. Ct. 1073, 41 L. Ed. 287], wherein the "single question" presented was "whether *personal* property bequeathed by will to the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute and within legislative control" (p. 627), and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy" (pp. 629-630), the court, following citation of the Fox case, *supra*, sustained the propriety of the tax—in "diminution" of the amount of the United States would receive under the will—as it was "only upon [such] condition that the legislature assent[ed] to [the] bequest" (p. 630). And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093], wherein was attained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse

to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra,* among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) (See, also, *Allen* v. *Markham,* 156 F. 2d 653, 659; *Clark* v. *Allen,* 331 U. S. 503, 517 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953].)

The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, *supra,* and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation . . . expressly authorized by statute" aid the government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body" (see *State of Ohio* v. *Helvering,* 292 U. S. 360, 370 [54 S. Ct. 725, 78 L. Ed. 1307]; *State of Georgia* v. *Evans,* 316 U. S. 159, 161 [62 S. Ct. 972, 86 L. Ed. 1346]), the further requirement of the section is concededly unsatisfied in the government's admission that though "various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and

to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property." [5] It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator has his domicil" effecting a restriction as to who may be devisees or legatees. (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

[6] Nor does it strengthen the government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to . . . the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemptions, and in making laws relating to these two subjects, over which it had plenary authority, the Legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. (*In re Wilmerding, supra*, 117 Cal. 281, 286-287.) There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws (*Estate of Lindquist*, 25 Cal. 2d 697, 705 [154 P. 2d 879], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988]; *Estate of Walker*, 25 Cal. 2d 719, 720 [154 P. 2d 891], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988,

1989]) or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances. (*United States* v. *Stevens*, 302 U. S. 623 [58 S. Ct. 388, 82 L. Ed. 484]; *Mauck* v. *United States*, 94 F. 2d 745). But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. (*United States* v. *Perkins*, *supra*, 163 U. S. 625, 629.)

The government finally relies on the *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398], to sustain the bequest in question, but an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the "United States Veterans Administration . . . for the purpose of rendering to disabled veterans of the world war . . . such aid, comfort, [and] assistance . . . as may to them be most helpful and profitable; determinable by said . . . [organization]." (P. 649.) As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers'" (p. 652), the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property . . . [which would] embrace gifts by means of wills, as well as by transfers during the lifetime of the donors." (P. 653.) Upon classifying the Veterans Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California (Prob. Code, § 27), the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America" (p. 651), that "the United States Government is a corporation" (p. 652), that "the [agency] is authorized by statute to take property by will" (p. 652), and that therefore the United States Government, functioning through one of its

component parts in a designated field of operation, is a "corporation . . . expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. (P. 653.) But the validity of the bequest there involved need not rest on that ground, for, as the court indicated in its reference to the analogous considerations prevailing in the *Estate of Yule*, 57 Cal. App. 2d 652 [135 P. 2d 386], the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" (p. 654), and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor" (*Estate of Yule, supra*, p. 654), and the further discussion in the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code" (p. 650) was unnecessary to the decision, and certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the government's reliance upon the Hendrix case in nowise strengthens its position here. In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will," the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

Gibson, C.J., Shenk, J., Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

TRAYNOR, J.—I dissent for the reasons set forth in *Estate of Hendrix*, 77 Cal. App. 2d 647, 651-653 [176 P. 2d 398].

OPINION OF THE DISTRICT COURT OF APPEALS

GOODELL, J.—The decedent, a resident of San Francisco, left a will reading as follows:

"June 30, 1932,
205—3rd St.,
San Francisco, California.

This is my last Will & Wish
That I give all I own & possess to the United States government U.S.A.
The beneficiary shall be executor
My body shall be cremated after death
Signed Gust Burnison
Approved July 27, 1944."

The testator left personal property appraised at $22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

"At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes."

(*Estate of Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460].)

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (*Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093].)

[1] By Section 27 of the Probate Code our Legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state," the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance. Surely if the Legislature had intended to include the federal government it would have named it. As aptly said in *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], " 'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the Legislature adopted "An Act to authorize the several counties, cities and counties, cities and towns of this State, . . . to receive property by gift, bequest, and devise, . . ." (Stats. 1881, p. 2.) In 1905, an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27.) Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for 24 years. In 1931, then, when the Legislature added "the state" in connection with "counties" and "municipal corporations" it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the government of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court held (as the state court had, 52 N. Y. 530 [11 Am. Rep. 751]) that this question had to be determined by the laws of

New York. The court, speaking through Mr. Justice Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devises of real property while the instant case deals with a bequest of personalty. The reasoning of the Fox case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal force to this case. Indeed the Supreme Court as recently as 1942 in the Irving Trust Co. case, *supra*, cited the Fox case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the Irving Trust Co. case. Its claim that, assuming "that the Fox case cannot be distinguished, it must be regarded as overruled," is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether the words "authorized by statute" found in the last sentence of section 27 means a statute of this state only, or one of any state, or an act of the Congress, for the government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has pur-

ported to authorize the United States to so acquire property."

The government relies chiefly on *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398] and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration," an agency of the government. For the reasons appearing in the Hendrix opinion the questions presented in that case and in this are quite dissimilar. [2] This bequest is to the United States of America, without qualification. It is not to any agency of the government, incorporated or unincorporated, or to the government as trustee, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the Fox case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Code Civ. Proc., § 1858).

The government relies, also, on *Dickson* v. *United States*, 125 Mass 311 [28 Am. Rep. 230], where the court held valid a devise and bequest to the United States of America. In distinguishing the Fox case the court said that that case "proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees . . ." The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

Nourse, P.J., and Griffin, J. pro tem., concurred.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOE BURNISON AND PHIL C. KATZ, PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CASPER A. ORNBAUN,
HARRY N. GROVER,
EVERETT H. ROAN,
Counsel for Appellee, Joe Burnison.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

IN THE MATTER OF THE ESTATE OF GUST BURNISON, ALSO CALLED GUSTAV BURNISON, DECEASED

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOE BURNISON AND PHIL C. KATZ, PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellees

ANSWER AND OPPOSITION TO APPELLANT'S PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

MOTION FOR THE DISMISSAL OF SAID PETITION OF APPEAL

and

MOTION FOR AFFIRMANCE OF THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Now comes Joe Burnison, one of the above named appellees, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, as amended, and

in oppposition to the granting of, and in reply to the Petition for Appeal to the Supreme Court of the United States filed by the above named appellant respectfully represents as follows:

The Facts

The facts are as stated in the introductory paragraph of the opinion of the Supreme Court of the State of California:

> "This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States government U.S.A." Appellant maintains that the 'United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident' thereof, that the testamentary 'bequest' is therefore 'void', and that all of the estate should be distributed to the 'heirs at law of deceased under and pursuant to the laws of succession of' this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved."

Question Presented by Petition for Appeal

The only question presented by the said petition for appeal is as to the constitutionality of Section 27 of the Probate Code of the State of California, which designates those who may take under a will executed in the State of California and reads as follows:

> "*Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or

lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

Appellant contends that said statute is unconstitutional as regards the Constitution of the United States of America, and asserts that a substantial question is involved in this proceeding for the following reasons:

(1) That "the United States as a body politic established by the Constitution has capacity, by virtue thereof, to receive voluntary bequests and devises, as an incident to that sovereignty" (p. 6, Appellant's Statement as to Jurisdiction); and

(2) That "the power of the states over the descent of property is limited by the Constitution" (p. 10, Appellant's Statement as to Jurisdiction); and

(3) That Section 27 of the Probate Code of California discriminates "against the United States in violation of Article VI of the Constitution" (p. 13, Appellant's Statement as to Jurisdiction).

The Honorable Supreme Court of the United States of America Has No Jurisdiction to Entertain an Appeal in This Proceeding.

The Honorable Supreme Court of the United States has no jurisdiction to entertain an appeal in this proceeding, which involves Section 27 of the Probate Code of the State of California governing the devolution of property by a will executed in said State.

A state statute may not be declared to be unconstitutional, as regards the Constitution of the United States,

unless it encroaches upon a subject governed by the said Constitution.

Authorities are legion to the effect that the Constitution of the United States is a grant of powers, and that the federal government can exercise no powers except those specifically enumerated in the Constitution of the United States and such implied powers as are necessary and proper to carry into effect and enumerated powers.

We quote the following pertinent language from the opinion of the Supreme Court of the United States in the case of *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315, 316 (year 1936):

> "It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> "The two classes of powers are different, both in respect of their origin and their nature. *The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.* Carter *v.* Carter Coal Co., 298 U. S. 238, 294." (Emphasis ours.)

Since the year 1850 it has been the rule established by the Supreme Court of the United States that the devolution of property by will is a matter to be regulated exclusively by the Legislatures of the several states as regards real

and personal property within their dominions, and that there is nothing in the Constitution of the United States to prevent the several states from designating who may or may not take by a will executed in the particular state jurisdiction with reference to property situated within said jurisdiction, and further that the right to take property by devise or bequest under a will is not an inherent right of citizenship, but is a creature of statute, to be granted or denied by the Legislature of the particular State involved.

In *Mager* v. *Grima*, 49 U. S. 489, 492 (8 Howard) (year 1850), the Honorable Supreme Court of the United States states as follows:

> *"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it."* (Emphasis ours.)

And we quote from the following cases decided by the Supreme Court of the United States:

> *United States* v. *Fox*, 94 U. S. 315 at 321 (year 1876): "Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution, in 1777; and, with some modifications in its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all.* His power is bounded by its conditions. That "statute provides that a devise of lands may be made 'to any person capable by law of holding real estate; but no devise to a corporation shall be

valid unless such corporation be expressly authorized by its charter or by statute to take by devise.'

The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation, —but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as created under the laws of the State. It was so held by the Court of Appeals in White *v.* Howard, 46 N.Y. 164, 165, and its construction of the statute is conclusive upon us." (Emphasis ours.)

Maxwell v. *Bugbee*, 250 U. S. 525 at 536 (year 1919):

"*The right to inherit property, or to receive it under testamentary disposition, has been so frequently held to be the creation of statutory law, that it is quite unnecessary to cite the decisions which have maintained the principle.*" (Emphasis ours.)

Lyeth v. *Hoey*, 305 U. S. 188 at 193 (year 1938):

"*Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction.* Mager *v.* Grima, 8 How. 490, 493; Maxwell *v.* Bugbee, 250 U. S. 525, 536, 537. *The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction.* Uterhart *v.* United States, 240 U. S. 598, 603." (Emphasis ours.)

Irving Trust Co. v. *Day*, 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093, 1098 (year 1942):

"Rights of succession to the property of deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even*

abolish the power of testamentary disposition over property within its jurisdiction. Mager *v.* Grima, 8 How. (U.S.) 490, 12 L. Ed. 1168; United States *v.* Fox, 94 U. S. 315, 24 L. Ed. 192; United States *v.* Perkins, 163 U. S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; cf. Randall *v.* Kreiger, 23 Wall. (U.S.) 137, 148, 23 L. Ed. 124, 126." (Emphasis ours.)

Clark v. *Allen;* 331 U. S. 503 at 517 (year 1947):

"*Rights of succession to property are determined by local law. See Lyeth* v. *Hoey,* 305 U. S. 188, 193; Irving Trust Co. *v.* Day, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. Hauenstein *v.* Lynham, supra. Then the state policy must give way. Cf. Hines *v.* Davidowitz, 312 U. S. 52. *But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country,* United States *v.* Curtiss-Wright Corp., 299 U. S. 304, 316-17, *or making a compact with it contrary to the prohibition of Article I. Section 10 of the Constitution.* What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (Emphasis ours.)

The case last cited is heavily relied upon by appellant in its statement of jurisdiction, page 10, but the quotation there set forth is not complete. The complete statement quoted above sustains appellee's position that no constitutional question is involved in this proceeding and that this Honorable Court has no jurisdiction in the matter.

The Supreme Courts of the several states consistently have followed the rule established by the decisions of the Supreme Court of the United States, and the decisions

of other states subscribing to the principles enunciated therein, and we quote as follows:

"*Taylor* v. *Payne* (Fla.), 17 So. (2d) 615, 154 A. L. R. 677, 679:

'The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. *Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication.* And except as the power to will property has been limited indirectly by Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. *Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation.* Accordingly, the right is at all times subject to the regulation and control by the legislative authority which creates it. *The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class* or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. Thomas v. Williamson, 51 Fla. 332, 40 So. 831, 834; Patton v. Patton, 39 Ohio St. 590, 596; In re Noves' Estate, 40 Mont. 178, 105 P. 1013; In re Beck's Estate, 44 Mont. 561, 121 P. 784, 1057; In re Walker's Estate, 110 Cal. 387, 42 P. 815, 1082, 30 LRA 460, 52 Am. St. Rep. 104; Redfearn on Wills and Administration of Estates in Florida, pp. 42 et seq." (Emphasis ours.)

Hazard v. *Bliss*, 43 R. I. 43, 113 Atl. 469, 23 A. L. R. 826, 837:

"• • • the right to take property by descent or devise is not a natural one, but is a privilege granted by the state upon such condition as it may impose and subject in all respects to its regulation. Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594."

McDermid v. *Bourhill*, 101 Ore. 503, 199 Pac. 610, 22 A. L. R. 428, at 432:

"*It has been definitely settled that the right to take property by devise or descent is the creature of law, and not a natural right.* Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, "18 Sup. Ct. Rep. 594; United States *v.* Perkins, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073; Carpenter *v.* Pennsylvania, 17 How. 456, 15 L. Ed. 127; Knowlton *v.* Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747, and extensive list of cases collected in note found in 9 Ann. Cas. 711. It has been stated: 'In most jurisdictions in the United States, it is apprehended, the capacity to make a will, whether of real estate or personalty, depends entirely on statute. The legislature has plenary power to withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases.' 40 Cyc. 997." (Emphasis ours.)

Beck's Estate, 44 Mont. 561, 121 Pac. 784, at 786:

"The right to make testamentary disposition of property depends entirely upon the will of the Legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses. In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013. *A necessary postulate of this proposition is that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty.*" (Emphasis ours.)

In view of these decisions, it cannot possibly be contended that section 27 of the Probate Code of the State of California violates the Constitution of the United States, if the United States Government be excluded from its purview. The United States Government is definitely excluded. Had it been the intention of the Legislature of the State of California to include the United States Government in said section, the United States Government would have been named as the first taker under the rule stated in *Davis* v. *Pringle*, 268 U. S. 315 at 318, as follows:

> "The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause if within its purview."

In rendering its very clear opinion on the issues involved in the present case, the Honorable Supreme Court of the State of California cited federal and state decisions directly in point and attention is respectfully invited to said opinion.

Section 27 of the Probate Code of the State of California Does Not Constitute an Unlawful Discrimination Against the United States.

Since the Supreme Court of the United States has conclusively decided that the matter of the devolution of property is a subject to be handled exclusively by the Legislatures of the several states, there is no basis for appellant's claim that section 27 of the Probate Code of the State of California unlawfully discriminates against the United States.

Said code section (quoted supra) enumerates those who may take by a will executed in California. The United States is not named as one who may take, and was intentionally excluded by the Legislature of California. Said Legislature had full power and authority to exclude the United States.

This contention of appellant is well answered by the opin-

ion of the Supreme Court of the State of California in the present case where it is stated:

> "The Government's contention that if Section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimination against the United States' it is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.
>
> *Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a 'corporation . . . expressly authorized by statute' aid the Government* in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' is such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio *v.* Helvering, 292 U. S. 360, 370; State of Georgia *v.* Evans, 316 U. S. 160, 161), *"the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise of bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson *v* United States, 125 Mass. 311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state

having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will.' (United States *v.* Fox, supra, 94 U. S. 315; United States *v.* Perkins, supra, 163 U. S. 625; Irving Trust Co. *v.* Day, supra, 314 U. S. 556.)" (Emphasis ours.)

No Substantial Question Is Presented by Appellant in This Proceeding

Appellee respectfully contends that no substantial question is presented by appellant in this proceeding, and that unless this Honorable Court grants the motion of appellee hereinafter contained for a dismissal of this proceeding or an affirmance of the judgment of the Supreme Court of the State of California it will be necessary for this Court to retrace the ground covered by the California Supreme Court, only, we believe, to arrive at the same conclusions as those arrived at by the California Supreme Court.

The question here is not as to the power of the United States to accept a voluntary bequest—*The question is as to the power of the State of California by statute to designate those who may take by a will executed in said State of California.*

All of the decisions of the Supreme Court of the United States and of the Supreme Court of the State of California, as well as those of other states (see authorities above cited and quoted from), unqualifiedly sustain the power of the State of California, by statute, to control the devolution of property by will.

Again we quote from the opinion of the Honorable Supreme Court of the State of California in the present case:

"The Government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimina-

tion against the United States' is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

"*Nor does the reference in the last sentence of section 27 of the Probate Code to testamentary capacity of a 'corporation * * * expressly authorized by statute' aid the Government* in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' in such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio v. Helvering, 292 U. S. 360, 370; State of Georgia v. Evans, 316 U. S. 160, 161), *the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses * * * no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise of bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson *v.* United States, 125 Mass. 311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will'. (United States *v.* Fox, supra, 94 U. S. 315; United States *v.* Perkins, supra, 163 U. S. 625; Irving Trust Co. *v.* Day, supra, 314 U. S. 556.)." (Emphasis ours)

There can be no question as to discrimination against the United States under the provisions of Article VI of the Constitution of the United States. The pertinent part of said article reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There is however nothing in the United States Constitution or in any Federal statute which governs the devolution of property by will. The several States have always had and still have the power, by statute to designate the persons who may take by will.

Appellant relies upon *Dickson* v. *United States,* 125 Mass. 311. In that case, the Court states:

> "The decision in United States *v.* Fox, 94 U. S. 315, affirming S. C. 52 N. Y. 530, by which it was held that a devise by a citizen of New York of real estate in New York to the government of the United States was void, proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legisture of that state. That decision has no application to this case. *The statutes of this Commonwealth where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees; and there is no evidence before us that any such restriction is made by the laws of Iowa, where the rest of the real estate is situated.* Gen. Sts. c 92, §§ 1, 2. Jackson *v.* Phillips, 14 Allen, 539, 552, 589, 591. Fellows *v.* Miner, 119 Mass. 541. Lorings *v.* Marsh, 6 Wall. 337, 355. Ould *v.* Washington Hospital, 95 U. S. 303." (Emphasis ours)

We respectfully submit that it would be contrary to the democratic principles forming the basis of the government of the United States to endorse a policy which would permit said Government, under the guise of "the general right of sovereignty," to ignore the limitations of the Constitution of the United States and encroach upon the domain of the State of California.

We further respectfully submit that no Federal question, is presented in this proceeding, and that said proceeding should be dismissed or the judgment of the Honorable Supreme Court of the State of California should be affirmed.

CASPER A. ORNBAUN,
Attorney for Joe Burnison, Appellee.
HARRY N. GROVER,
EVERETT H. ROAN,
Of Counsel.

MOTION FOR DISMISSAL OF PETITION FOR APPEAL OR AFFIRMANCE OF JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Appellee Joe Burnison moves the above entitled Court to dismiss the Petition For Appeal on file herein, or to affirm the judgment of the Supreme Court of the State of California involved herein, on the grounds that no Federal question is involved, that no constitutional question is involved, and that no substantial question is presented, as more fully appears from the record on file herein, particularly including the Statement As To Jurisdiction filed by the appellant, and the appellee's Answer and Opposition to said Petition for Appeal.

Casper A. Ornbaun,
Attorney for Joe Burnison, Appellee.
Harry N. Grover,
Everett H. Roan,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOE BURNISON AND PHIL C. KATZ, PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO

No. 188

THE UNITED STATES OF AMERICA, APPELLANT

v.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, ET AL.

ON APPEALS FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 171, the Superior Court of the State of California in and for the City and County of San Francisco wrote no opinion. The opinion of the District Court of Appeals, State of California,

First Appellate District (B. R. 48–52)[1] is reported at 87 Adv. Cal. App. (2d) 310.[2] The opinion of the Supreme Court of the State of California (B. R. 54–61) is reported at 33 Cal. (2d) 638.

In No. 188, the Superior Court of the State of California, in and for the County of Los Angeles wrote no opinion. The opinion of the Supreme Court of California (G. R. 32–33) is reported at 33 Cal. (2d) 647.

JURISDICTION

The judgments of the Supreme Court of California were entered on March 22, 1949 (B. R. 61; G. R. 33). The petitions for appeal were submitted to Chief Justice Vinson on June 15, 1949 (B. R. 62; G. R. 34–35) and were allowed on June 16, 1949 (B. R. 63–64; G. R. 36). No. 171 was docketed in this Court on July 6, 1949 and No. 188 was docketed on July 12, 1949. This Court noted probable jurisdiction on October 10, 1949 (B. R. 66; G. R. 38). Jurisdiction of this Court rests upon 28 U. S. C. 1257 (2).

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[1] There are two separate printed records in these cases. For convenience (B. R.) and (G. R.) will be used to refer to the *Burnison* and *Gayetty* records respectively.

[2] This opinion is not reported in the bound volume of 87 Cal. App. 2d, since, as we have been informed by the publisher of the California reports, under California law an opinion of a district court of appeal on which the California Supreme Court grants a hearing is regarded as superseded by the Supreme Court's subsequent opinion.

QUESTIONS PRESENTED

The Supreme Court of California has construed Section 27 of the Probate Code of California as barring the United States from receiving testamentary gifts under wills of California domiciliaries, while permitting the State of California and its governmental subdivisions to receive such gifts. The questions presented are:

1. Whether Section 27, as so construed, infringes upon the inherent sovereign power of the United States to receive testamentary gifts.

2. Whether Section 27, as so construed, effects an unconstitutional discrimination against the United States.

STATUTE INVOLVED

Section 27 of the Probate Code of California provides:

> *Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanitorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other cor-

poration can take under a will, unless expressly authorized by statute.

STATEMENT

No. 171 (Burnison)

Upon his death on February 23, 1946, Gust Burnison, also called Gustav Burnison, a resident of San Francisco, California, left a holographic will, in which he stated:

> This is my last Will & Wish
> That I give all I own & possess to The United States government U. S. A.
> The benefreiory shall be executor
> My body shall be cremated after death

(B. R. 1, 2). The Superior Court of the State of California in and for the City and County of San Francisco admitted this document as the last will and testament of the decedent on the petition of Phil C. Katz, Public Administrator of the City and County of San Francisco and appointed him as administrator with the will annexed (B. R. 3–4). The property left by the decedent, all personalty, was appraised at $22,668.70 (B. R. 6–10).

The heirs-at-law, three brothers, one sister and thirteen nieces and nephews, petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized to take by will under the provisions of Section 27, Probate Code of the State of

California or under any other statute or law of the State of California" and hence that the bequest to the United States was void (B. R. 10–11, 13). The Superior Court sustained the objection which the United States had interposed (B. R. 17–18) and dismissed the petition (B. R. 18).

The appeal of the heirs to the Supreme Court of California was referred for hearing and decision to the District Court of Appeals, State of California, First Appellate District, as authorized by Article VI, Section 4c of the Constitution of the State of California. The District Court of Appeals reversed the order of the Superior Court (B. R. 52). That court construed Section 27 as not sanctioning bequests or devises to the United States *eo nomine* (B. R. 51). It further stated that the contention of the United States that the statute, if so construed, would be unconstitutional is answered by *United States* v. *Fox,* 94 U. S. 315 and *Irving Trust Co.* v. *Day,* 314 U. S. 556 (B. R. 50–51).

Upon the petition of the United States for a hearing (B. R. 25–47), the Supreme Court of California, sitting in bank, approved, one judge dissenting, the holding of the District Court of Appeals and reversed the order of the Superior Court (B. R 61). The court held that the State of California has the exclusive power to designate those who may take property by descent and hence that "section 27 * * * prescribing

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'who may take by will,' must be construed as determinative of the validity of the bequest here in question" (B. R. 55). The court went on to interpret Section 27 as excluding the United States and all other states except California from among the eligible beneficiaries (B. R. 56–57).

No. 188 (Gayetty)

Upon her death on February 4, 1945, Emily P. Sanborn, a resident of the County of Los Angeles, left a will dated June 12, 1942 (G. R. 1, 2, 16–17). Item III of the will provided: "I hereby give, devise and bequeath unto the UNITED STATES OF AMERICA, all of my bonds issued by the United States Government, which stand in my name and which I may hereafter acquire in my name, and all of the real properties and interests in real properties which I now own and of which I shall or may die seized or possessed" (G. R. 16–17).

Annie L. Harris, an heir-at-law, petitioned the Superior Court of the State of California in and for the County of Los Angeles to admit this will for probate, alleging it to be the last will of the deceased (G. R. 25–27). In her petition, she stated that Willis Sargent, named in the will as executor, had declined to act and prayed that Letters of Administration with-the-will-annexed be issued to her (G. R. 25, 27). She further declared "her hostility to Item III of said Will"

and that "at the appropriate time and by appropriate proceedings, she will object to distribution of said estate under the terms of said Item III on the ground that a testamentary disposition may not be made to the UNITED STATES OF AMERICA under the provisions of Section 27 of the Probate Code of the State of California" (G. R. 27). After a contest, this will was admitted for probate and Letters of Administration with-the-will-annexed were issued to Annie L. Harris (G. R. 17–18, 19–20).

The administratrix thereafter filed a petition for final distribution, alleging that although the United States claimed to be entitled to have distributed to it all of decedent's United States Government Bonds and all of her real property, the United States was not eligible to take these gifts under Section 27 of the Probate Code and that the heirs-at-law were entitled to distribution of the whole estate (G. R. 1, 5–6). The Superior Court, noting that the United States objected to the heirs' petition, entered a decree of distribution to the United States in accordance with the provisions of Item III of the will (G. R. 13, 14–15).

The heirs appealed to the Supreme Court of California (G. R. 21–22). In an opinion rendered the same day as that in the *Burnison* case (No. 171), the Supreme Court of California, one judge dissenting, reversed on the authority of

that case (G. R. 32–33). The court rejected the contention of the United States that two statutes (Act of April 3, 1945, 59 Stat. 48, c. 51, § 4; 31 U. S. C. 757e; Act of March 3, 1903 (32 Stat. 1112, c. 1007, § 1; 40 U. S. C. 304)) established its authority to take the bonds and real estate left by it by the decedent, with the comment (G. R. 33):

> * * * such Congressional enactments, by their provision for the Government's disposition of such testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law (Estate of Burnison, *supra*.) * * *

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of California erred:

1. In holding that Section 27 of the Probate Code of California, barring the United States from receiving testamentary gifts under wills of California domiciliaries, does not effect an unconstitutional discrimination against the United States.

2. In holding that Section 27 does not infringe the inherent sovereign power of the United States derived from the Constitution.

3. In holding that a state's power to control the descent of property is not subject to any constitutional limitations.

SUMMARY OF ARGUMENT

I

These decisions of the California Supreme Court are bottomed on the fallacious premise that the power of the state over the devolution of property is absolute and exclusive, unfettered by the federal Constitution. But the control of a state over the descent of property located within its boundaries is, like every other aspect of a state's power, subject to the limitations and protections afforded by the federal Constitution. It is "under our Constitution [that] the devolution of property is determined by the laws of the several States." *Snyder* v. *Bettman,* 190 U. S. 249, 252. Thus, a treaty permitting foreign nationals to take testamentary gifts overrides, under the supremacy clause of the Constitution, the inconsistent provisions of state law. *Clark* v. *Allen,* 331 U. S. 503. Similarly, for example, it cannot be doubted that a restriction imposed by state law on the right to bestow or receive testamentary gifts, based on race or color, would violate the Fourteenth Amendment. Cf. Section 1 of the Civil Rights Act of 1866 (R. S. 1978, 8 U. S. C. 42); *Shelley* v. *Kraemer,* 334 U. S. 1, 10. And a state tax on the descent of property—

traditionally regarded as being based in part, at least, on the state's control over descent—may be so arbitrary or unreasonable as to be invalid under the equal protection clause. It is, therefore, plain that California's regulation of the descent of property is valid only insofar as it does not infringe upon the rights of the United States under the Constitution.

II

A. The United States' right to receive testamentary gifts, like the power to enter contracts, to sue in its own name, to take security for debts owing it and to requisition property, is one of the inherent attributes of the general sovereignty created by the Constitution. The United States has long received such gifts from decedents domiciled in virtually all states, and the Treasury Department's power to accept these gifts has never been questioned. Although a general statute authorizing the acceptance of these gifts has never been thought needful, various statutes enacted by Congress in regard to particular types of testamentary gifts uniformly assume the propriety of acceptance and either deal with their disposition or vest authority in a specified agent, other than the Secretary of the Treasury, to receive the gift for particular governmental purposes.

B. The supremacy clause of the Constitution subordinates the state's control over property

devolution to the United States' right to receive testamentary gifts. Since every authorized activity of the United States is an exercise of its governmental powers, it follows that the right of the United States to perform those functions which are exercises of its inherent sovereign powers is coextensive with the federal power. Accordingly, since the supremacy clause protects from nullifying state action other inherent sovereign powers of the United States, as well as other ways of securing adequate public revenues even where the fund involved is in a decedent's estate, it would be anomalous if the United States' inherent right to receive testamentary gifts, a traditional and important source of public revenue, were not protected by the supremacy clause and instead were dependent upon the grace of subordinate states.

United States v. *Fox*, 94 U. S. 315, upon which the court below placed its principal reliance, is demonstrably erroneous, and should be overruled. The Court's subsequent recognition of constitutional limitations on the state's power over the devolution of property undercuts the broad ground of that case. Moreover, the decision, while relying on the rule of English law that the sovereign has control over the devolution of property, disregarded the corollary English principle that bequests for the benefit of the country are valid, and hence made no attempt to reconcile

these principles in the light of our dual system of state and federal sovereignties with the federal Government supreme. *United States* v. *Perkins,* 163 U. S. 625, also relied upon below, is distinguishable as resting upon the power of the states to tax the transfer of property, a power which exists independently of the state's general control over the descent of property.

III

Section 27, denying to the United States a right to receive testamentary gifts which it accords to the State of California and its subordinate governmental units, works a discrimination against the United States which is prohibited by Article VI of the Constitution. It is clear, for example, that state legislation regulating the priority of claims against decedents' estates may not discriminate against claims arising under federal law. See *Pufahl* v. *Estate of Parks,* 299 U. S. 217, 227, 232. What is true of a right conferred upon a private person by federal statute is *a fortiori* true of a right which, under the Constitution, inheres in the United States as a sovereign.

ARGUMENT

The Supreme Court of California has construed Section 27 of its Probate Code to exclude the United States from the classes eligible to receive gifts under the wills of California domiciliaries

as effectively as if the statute, *in haec verba,* prohibited the United States from taking as a distributee. It rejected the Government's contentions that, as so construed, Section 27, in violation of the supremacy clause of Article VI of the Constitution, deprives the United States of the right, incident to its sovereignty, to receive testamentary gifts, and discriminates against the United States. The court below based these holdings solely on the ground that the power of the State of California over the devolution of property is absolute and exclusive, free from any constitutional limitations.

The decision below as to the proper construction of Section 27 is, of course, final here, and the United States does not now raise any question in regard thereto. The United States does, however, claim that Section 27, as so construed, is unconstitutional as applied to it. In Point I, we demonstrate that the broad ground of the decision below is erroneous and that a state's power over the disposition of property is subject to constitutional limitations, including the supremacy clause. We go on to show in Point II that Section 27 denies to the United States its sovereign right to receive testamentary gifts, contrary to the prohibitions of Article VI. In Point III, we show that the refusal of California to permit the United States to take testamentary gifts while sanctioning such gifts to itself and

its local governmental units discriminates against the United States, in violation of the supremacy clause.

I

THE POWER OF THE STATE OF CALIFORNIA OVER DISPOSITION OF PROPERTY LOCATED WITHIN ITS BOUNDARIES IS SUBJECT TO THE LIMITATIONS OF THE FEDERAL CONSTITUTION

The Supreme Court of California's rejection of the Government's claim that Section 27 of the Probate Code is unconstitutional as applied to it is based on the theory that the State of California had absolute and exclusive power over the devolution of property located within its boundaries, unrestrained by any provision of the federal Constitution. "The [state] legislature may withhold the right [of testamentary disposition] altogether, or impose any conditions or limitations upon it which it chooses" (B. R. 54). This proposition was predicated on broad generalities in the decisions of this Court (*United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *Irving Trust Co.* v. *Day*, 314 U. S. 556) to the effect that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction" (314 U. S. at 562) (B. R. 59). "In short," the court below commented, "the entire matter of the right of testamentary disposition

appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will' " (B. R. 59).

This proposition, so fundamental to the reasoning of the court below, is demonstrably unsound. This Court has had recent occasion to emphasize that the matter of the right of testamentary disposition is not entirely within the control of the state, but is subordinate to the federal Constitution. In *Clark* v. *Allen,* 331 U. S. 503, a California statute, as construed by the California courts, would have prohibited a devise of realty to a German alien; but a treaty between the United States and Germany guaranteed the right of the alien to take the property. This Court held that since "the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them" (331 U. S. at 508) and went on to say (331 U. S. at 517):

> Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey,* 305 U. S. 188, 193; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham* [100 U. S. 483, 488–490]. Then the state policy must give way.

Accord: *Chirac* v. *Chirac,* 2 Wheat. 259; *Hauenstein* v. *Lynham,* 100 U. S. 483, 488–490; *Geofroy* v. *Riggs,* 133 U. S. 258, 266, 267; *Blythe* v. *Hinckley,* 180 U. S. 333; *Sullivan* v. *Kidd,* 254 U. S. 433; *Nielsen* v. *Johnson,* 279 U. S. 47; *Todok* v. *Union State Bank,* 281 U. S. 449, 453. Cf. *Takahashi* v. *Fish Commission,* 334 U. S. 410, 428, fn. 3 (Mr. Justice Reed dissenting).

There are other situations in which it may confidently be asserted that state regulation of the devolution of property may be struck down as inconsistent with the federal Constitution. Thus, in *Oyama* v. *California,* 332 U. S. 633, the Alien Land Law of California was held to deprive an American citizen, who was the son of a Japanese alien, ineligible to citizenship, "of the equal protection of California's laws and of his privileges as an American citizen" (332 U. S. at 640), in violation of the federal Constitution, because it imposed on him "an onerous burden of proof" (332 U. S. at 644) to establish that gifts of land to him by his father were in fact gifts. There is no reason to suppose that the result would have been different if the Court had had before it those provisions of the same California law which dealt with devises by or to ineligible aliens. In the course of the opinion, the Chief Justice quoted with approval Section 1 of the Civil Rights Act of 1866 (R. S. 1978, 8 U. S. C. 42). That statute, which, as the Court noted, was "enacted before

the Fourteenth Amendment but vindicated by it" (332 U. S. at 640), provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to *inherit*, purchase, lease, sell, hold, and convey real and personal property. [Italics supplied.]

And in *Shelley* v. *Kramer*, 334 U. S. 1, where enforcement by state courts of restrictive covenants based on race or color was held to be a violation of the equal protection clause of the Fourteenth Amendment, the Court, again quoting Section 1 of the Civil Rights Act of 1866, stated (p. 10):

> It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.[8]

Although these cases involve *inter vivos* transactions, it should be noted that the Civil Rights Act, treated as having been incorporated into the

[8] See also *Buchanan* v. *Warley*, 245 U. S. 60; *Harmon* v. *Tyler*, 273 U. S. 668.

Fourteenth Amendment, imposes similar limitations on the state's power over testamentary transfers of property, and the rationale of these cases would be equally apposite were a state to undertake to base eligibility to bestow or to receive testamentary gifts on race or color.[4]

Even apart from these cases, there can be but little question that a state's power over testamentary dispositions is subject to constitutional limitations and protections, once it is recognized that it is "under our Constitution [that] the devolution of property is determined by the laws of the several states." *Snyder* v. *Bettman,* 190 U. S. 249, 252. For example, it has been said that a state "could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone." Mr. Justice Holmes, dissenting on other grounds in *Maxwell* v. *Bugbee,* 250 U. S. 525, 544. And it is settled that a tax imposed on the descent of property—which traditionally has been based in part at least on the state's power to control descent—may involve such an arbitrary or unreasonable exercise of that power as to

[4] Even where the property involved is owned by the state itself as part of its public domain, its control over the use of that property is not absolute and is subject to constitutional limitations. *Takahashi* v. *Fish Comm'n.,* 334 U. S. 410; *Toomer* v. *Witsell,* 334 U. S. 385. See *infra,* fn. 17, pp. 34–35.

violate the equal protection clause of the Fourteenth Amendment. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Campbell* v. *California*, 200 U. S. 87, 94; *Keeney* v. *New York*, 222 U. S. 525, 535; *Maxwell* v. *Bugbee*, 250 U. S. 525, 535, 540; *Stebbins* v. *Riley*, 268 U. S. 137, 142.

It is interesting to observe that in *Clark* v. *Allen* (331 U. S. at 517), this Court cited *Irving Trust Co.* v. *Day*, 314 U. S. 556, one of the principal cases relied on below (B. R. 58, 59). It there expressly noted that the broad proposition for which it cited the *Irving Trust Co.* case was limited by the "overriding federal policy," in the presence of which "state policy must give way." And, we believe, a careful reading of the *Irving Trust Co.* case makes it clear that, despite the broad statement there contained, the Court in that case likewise recognized that there are constitutional limitations on a state's power over the descent of property. That case involved a recently enacted New York statute, applicable to wills executed thereafter, requiring that waiver of dower to be effective must comply with certain prescribed formalities. The widow's waiver there did not so comply, and the decedent, although he had executed his will prior to the law's enactment, had republished it thereafter. The constitutional question sought to be raised was whether the law impaired the obligation of contract or

constituted a deprivation of property. Although the statement quoted and relied upon below would, if this Court had given it the meaning attributed to it by the California Supreme Court, have been dispositive of the case, this Court did not stop there but went on to note that these formalities were "such as New York might, without restraint from the Federal Constitution, annex to the privilege of making a will under its law" (314 U. S. at 563), for, as the Court stated:

> Its effect was to continue as obligations of his estate social responsibilities which he had assumed during life, unless they had been waived with required formality. The State could have conditioned any further exercise of testamentary power upon giving a right of election to the surviving spouse regardless of any waiver, however formally executed; and having recognized the binding effect of a waiver, it could condition that recognition upon acknowledgment, which was no doubt considered a desirable safeguard against casual, informal, or ill-considered abandonment of statutory protection, as well as against overreaching or fraud [314 U. S. at 563–564].

The Court's decision was not, as the broad statement implied, that the states' power over the descent of property was free from constitutional restraints, but rather that the control there at-

tempted to be exercised did not violate any constitutional limitation.[8]

Thus, it is clear that a state's power over the devolution of property is subject to constitutional restraints, and that the Supreme Court of California, to the extent that it relied on broad statements in opinions of this Court, taken out of context, has ignored "the oft-repeated admonition of Chief Justice Marshall 'that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are

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[8] *United States* v. *Perkins*, 163 U. S. 625, also relied upon by the Supreme Court of California, is, as is shown *infra*, fn. 18, pp. 36–37, distinguishable and not opposed to the Government's position here. *United States* v. *Fox*, 94 U. S. 315, the only case in which this Court passed on the precise question here involved, is discussed in detail, *infra*, pp. 33–36. The additional cases cited by respondents to support the broad ground below are likewise not opposed to the Government's position. In most instances the broad statements were *obiter dicta* and not directed to the question as to the impact of the Constitution on the state's power over devolution. See, *e. g.*, *Jones* v. *Habersham*, 107 U. S. 174; *Arndt* v. *Griggs*, 134 U. S. 316; *Hutchison Investment Co.* v. *Caldwell*, 152 U. S. 65 (all cited in Gayetty Motion to Dismiss, pp. 5–6); *Lyeth* v. *Hoey*, 305 U. S. 188 (Burnison Motion to Dismiss, p. 6). Cases such as *United States* v. *United Mine Workers*, 330 U. S. 258, 275 (Gayetty Motion to Dismiss, p. 4) citing the *Fox* case on other matters are obviously irrelevant here. *Clark* v. *Allen*, 331 U. S. 503 (Burnison Motion to Dismiss, p. 7), as we have demonstrated in the text, expressly recognizes constitutional restraints on the states' control of devolution. Careful perusal of other cases such as *Maxwell* v. *Bugbee*, 250 U. S. 525 (Burnison Motion to Dismiss, p. 6) reveal that there the state's power over devolution was not regarded as wholly unrestrained. See *supra*, pp. 18, 19.

used,' and that if they go 'beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision,' [which] has special force in this instance. *Cohens* v. *Virginia*, 6 Wheat. 264, 399." *Wright* v. *United States*, 302 U. S. 583, 593–594.

II

SECTION 27 OF THE CALIFORNIA PROBATE CODE, DENYING TO THE UNITED STATES THE RIGHT TO RECEIVE TESTAMENTARY GIFTS, VIOLATES THE SUPREMACY CLAUSE OF THE CONSTITUTION

A. *The United States Has, as an Incident to Sovereignty, the Right to Receive Testamentary Gifts.*

There can be no question at this date—and the court below has so conceded (B. R. 59)—that the United States, as a body politic established by the Constitution, has the power to receive voluntary bequests and devices as an incident to that sovereignty. The United States has long received testamentary gifts from decedents domiciled in virtually all states; the sole exceptions are California in the present cases* and New York in regard to devises of realty (see *United States* v. *Fox*, 94 U. S. 315, discussed *infra*, pp. 33-36).

* Prior to the present cases, the United States had received, under the wills of California domiciliaries, bequests and devises naming the United States or one of its agencies as the intended donee. See B. R. 40-41.

Since the earliest days of the Republic, the Treasury Department, in the exercise of this inherent power, has accepted these gifts without question. "The property or money, when received by the United States, must doubtless be applied to public purposes authorized by the Constitution and laws. But the right to receive money or property, voluntarily contributed, is not a separate power, but a capacity belonging to the United States as a body politic and incident to the right of sovereignty * * *." *Dickson* v. *United States,* 125 Mass. 311, 313–315.

The power of the United States to receive testamentary gifts has as its source the same general right of sovereignty as other powers which the United States has been held to possess even in the absence of an express constitutional grant: to enter contracts (*United States* v. *Maurice,* 2 Brock. 96, 109; *United States* v. *Tingey,* 5 Pet. 115, 128), to sue in its own name (*Dugan* v. *United States,* 3 Wheat. 172, 181), to take security for debts owing to it (*United States* v. *Bradley,* 10 Pet. 343, 359; *United States* v. *Linn,* 15 Pet. 290, 311; *Neilson* v. *Lagow,* 12 How. 98, 107–108; *United States* v. *Hodson,* 10 Wall. 395, 406–408), and to requisition property (*Kohl* v. *United States,* 91 U. S. 367; *United States* v. *Jones,* 109 U. S. 513, 518–519; *United States* v. *Carmack,* 329 U. S. 230; *Stockton* v. *Baltimore & N. Y. R. Co.,* 32 Fed. 9, 19 (C. C. D. N. J.), appeal dismissed,

140 U. S. 699). Like other inherent attributes of federal sovereignty, it needed no express constitutional provision. Cf. *Boom Co.* v. *Patterson*, 98 U. S. 403, 406; *United States* v. *Jones, supra; United States* v. *Tingey, supra; United States* v. *Carmack*, 329 U. S. 230, 241–242.

Congress has never felt that a general statute authorizing the acceptance of testamentary gifts was necessary. Since the right to receive these gifts flows directly from the Constitution, it may be exercised without an enabling statute. Cf. *United States* v. *Tingey*, 5 Pet. 115, 128; *United States* v. *Bradley*, 10 Pet. 343, 359; *Neilson* v. *Lagow*, 12 How. 98, 107–108; *Jessup* v. *United States*, 106 U. S. 147. The long-prevailing practice has been to accept bequests of money and other personal property not subject to burdensome conditions and to report that fact to Congress. Ordinarily no formal congressional action has been considered required, and none has been taken.

Congress has clearly assumed that the United States has the right to receive these gifts by enacting various statutes dealing with their disposition. Two of these statutes are particularly pertinent in *Gayetty* (No. 188), inasmuch as they relate to the disposition of the kind of property there left to the United States, *i. e.*, United States' savings bonds and real property. The Act of April

3, 1945, c. 51, 59 Stat. 48, 31, U. S. C. 757e,[7] provides a procedure for dealing with these bonds when they are received by bequest. The Act of March 3, 1903, 32 Stat. 1112, 40 U. S. C. 304,[8] similarly assumes the right of the United States to receive devises of land by authorizing the sale of lands so received. Congress' assumption that the United States has inherent capacity to receive testamentary gifts is also implicit in its provision that bequests and devises to the United States are deductible from gross estate in computation of federal estate tax. 26 U. S. C. 812 (d). In addition, Congress has, by special legislation, dealt with the receipt and disposition of specific testamentary gifts willed to the United States for designated purposes. These enactments likewise assume the capacity of the United States to receive the gift; they simply designate particular officials (other than the Sec-

[7] "Whenever any direct obligation of the United States, bearing interest or sold on a discount basis, is donated to the United States, is bequeathed by will to the United States, become [So in original] the property of the United States under the terms of a trust, or is by its terms payable upon the death of the owner to the United States or any officer thereof in his official capacity, the Treasurer of the United States upon receipt of such obligation shall effect redemption thereof. * * *"

[8] "The Secretary of the Treasury is authorized to sell such lands as have been or may be acquired by the United States by devise, upon such terms and after such public notice by advertisement as he may deem best for the public interest."

retary of the Treasury) to receive the gift and regulate its disposition.[9]

Thus, not only has the United States an inherent constitutional right, long recognized and encouraged by Congress, to accept testamentary

[9] In the Act of July 1, 1836, c. 252, 5 Stat. 64, Congress authorized the appointment of agents to assert "for and in behalf of the United States * * * the right of the United States to the legacy bequeathed to them by * * * James Smithson." And in the Act of August 10, 1846, c. 178, 9 Stat. 102, Congress, stating in the Preamble that the United States had received the bequest, established the Smithsonian Institution for the carrying out of the provisions of the bequest. See, also, Joint Resolution of June 22, 1938, c. 595, 52 Stat. 943 (Attorney General authorized "to accept a deed conveying to the United States of America title to" the home of the late Justice Holmes); Act of July 15, 1935, c. 381, 49 Stat. 481 (Secretary of Navy "authorized to accept on behalf of the United States" specific devises and bequests for benefit of the hospital fund, United States Navy).

Congress has also authorized several agencies generally to receive testamentary gifts for specific purposes, apparently for the purpose of encouraging such gifts. Title XI of the Second War Powers Act, 1942, c. 199, 56 Stat. 176, 183 (authorizing acceptance of "any gift * * * made on condition that it be used for a particular war purpose"); Act of March 3, 1925, c. 423, 43 Stat. 1107, 2 U. S. C. 154 *et seq.* ("Library of Congress Trust Fund Board"); 5 U. S. C. 393 (Post Office Department Library); 5 U. S. C. 721 (Civil Service employees generally); 16 U. S. C. 715d (sanctuaries for migratory birds); 20 U. S. C. 55, 74 (b) (Smithsonian Institution and National Gallery of Art); 22 U. S. C. 809 (Foreign Service; 24 U. S. C. 181 (St. Elizabeths Hospital); 34 U. S. C. 1115, 1116, 1118 (Naval Academy and its Museum); 38 U. S. C. 14 (hospitalized disabled veterans); 42 U. S. C. 219 (Public Health Service); 44

gifts for general governmental purposes, but also wherever, because of the testator's desire that the gift be devoted to specific rather than general governmental purposes, there could be doubt as to the authority of the agent of the United States to comply with that condition, Congress has uniformly dissipated that doubt by enacting the necessary legislation.

B. *The Supremacy Clause Precludes the States from Abrogating the Government's Right to Receive Testamentary Gifts*

1. It is clear from the foregoing that the United States has the right to receive testamentary gifts and that that right flows from its sovereignty created by virtue of the Constitution. In addition, it should be noted that, in accordance with the statement in *Dickson* v. *United States*, 125 Mass. 311, 313–314, that "the property or money, when received by the United States, must doubtless be applied to public purposes authorized by the Constitution and laws," bequests to the United States without limitations as to use are deposited in "Miscellaneous Receipts", subject to appropriation by Congress for the general expenses of the Government. If, however, the

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U. S. C. 300cc (National Archives); cf. Act of June 25, 1910, c. 384, 36 Stat. 703, 736, as amended, 55 Stat. 868, 38 U. S. C. 17 *et seq.* (National Home for Disabled Volunteer Soldiers). Cf. *United States* v. *Stevens*, 302 U. S. 623; *National Home* v. *Wood*, 299 U. S. 211.

bequest is conditional or for a specific purpose, or if Congress desires that it be used otherwise than for general expenses, special legislation may be enacted.[10] See *supra*, fn. 9, p. 26. In either case, the money is used for "public purposes authorized by the Constitution and laws" for the benefit of the public generally.

The results which would flow from the decision below, cutting off this source of revenue to the Government[11] as well as prohibiting receipt by the Government of gifts such as those of James

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[10] A bequest to or for the use of a particular agency authorized by statute to receive testamentary gifts for specific purposes goes into a special fund "as * * * authorized by law."

[11] In recommending the passage of the proposed Title XII (Title XI as enacted) of the Second War Powers Act, 1942 (56 Stat. 176, 183), which authorizes the Secretary of the Treasury to accept gifts conditioned on their use for war purposes, the House Committee on the Judiciary commented (H. Rep. No. 1765, 77th Cong., 2d sess., p. 11):

> Since the Pearl Harbor attack over 15,000 persons have made donations of money and other property to the Government to be used in the war effort. These donations, which are presently at the rate of about $3,000,000 a year, came from individuals, schools, fraternal organizations, labor organizations, groups of citizens, and employees of various companies.
>
> This title will enable patriotic citizens who wish to bear more than their share of the war costs to make voluntary contributions to the war effort. * * *

See, also, S. Rep. No. 989, 77th Cong., 2d sess., p. 8. ("It is thought that acceptance of such gifts by the Government will make for a sense of participation in the war effort by the donors and to some extent lower the cost of prosecuting the war.")

Smithson and Justice Holmes, are, we submit, proscribed by the supremacy clause of the Constitution, to which the states' power over the descent of property is subordinate. The supremacy clause overrides state legislation which would impede the performance by the federal Government of any of its functions and so modifies "every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch* v. *Maryland*, 4 Wheat. 316, 427. This doctrine of federal supremacy, accepted in many decisions of this Court,[12] is coextensive with the scope of federal power, for every authorized activity of the United States is an exercise of its governmental power. *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, 32; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102. "Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked to aid in such consummation, state consti-

[12] See, *e. g.*, *Osborn* v. *United States Bank*, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590–591; *Tennessee* v. *Davis*, 100 U. S. 257, 263; *In re Neagle*, 135 U. S. 1; *Ohio* v. *Thomas*, 173 U. S. 276, 283; *Johnson* v. *Maryland*, 254 U. S. 51, 55–56; *Arizona* v. *California*, 283 U. S. 423; *Mayo* v. *United States*, 319 U. S. 441; see, also, *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U. S. 261.

tutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power." *United States* v. *Belmont*, 301 U. S. 324, 331–332.

The supremacy clause has repeatedly been held to preclude the states from interposing obstacles to the Government's use of its other inherent sovereign powers. As to the Government's power of eminent domain, which, like the right to receive gifts by will, flows from the inherent sovereignty of the Government, Mr. Justice Strong said in *Kohl* v. *United States*, 91 U. S. 367, at 371, 374:

> If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen.
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> * * * * *
>
> *If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can the State prescribe the manner in which it must be exercised. The consent of a State can never be a condition*

precedent to its enjoyment. [Italics supplied.] [13]

And the Government's inherent power to pay its debts and disburse its funds is the basis of the holding in *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, 366–367, that these matters are governed by federal rather than state law. "The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state" (318 U. S. at 366). See, also, *United States* v. *Allegheny County,* 322 U. S. 174, 183, and cases cited. Cf. *United States* v. *Standard Oil Co.,* 332 U. S. 301, 306.

The supremacy clause also precludes the interposition of state obstacles to the securing of public revenues adequate to sustain the public burden, even where the fund involved is in a decedent's estate. Thus, the United States may enforce a lien for taxes upon real estate under the internal revenue laws without complying with state law requiring recordation and limiting the time enforcement (*United States* v. *Snyder,* 149 U. S. 210, 214; [14] *United States* v. *Allegheny County,*

[13] See, also, *United States* v. *Carmack,* 329 U. S. 230, 240.

[14] It was stated in the *Snyder* case (149 U. S. at 214):

"The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain

322 U. S. 174, 183); this lien is effective as to property in a decedent's estate (*Detroit Bank* v. *United States,* 317 U. S. 329), and is entitled to priority over state liens, allegedly made superior by state law (*Michigan* v. *United States,* 317 U. S. 338). Likewise, debts due to the Government are entitled to priority in payment by virtue of R. S. 3466 (31 U. S. C. 191), whether the debt be due from a decedent's estate (*United States* v. *Remund,* 330 U. S. 539) or is opposed by a state's claim for taxes (*Massachusetts* v. *United States,* 333 U. S. 611; *Illinois* v. *United States,* 328 U. S. 8). Finally, a claim of the Government against a decedent's estate will not be barred by failure to file within the time required by state law, and if the state statute undertakes to invalidate the claim of the United States so that it cannot be enforced at all, it transgresses the limits of state power. *United States* v. *Summerlin,* 310 U. S. 414; cf. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456; *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 126.

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itself in the execution of its functions is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation."

In brief, a strange constitutional anomaly would exist if the states, which cannot interfere with the Federal Government's claims against the estates of decedents, could prohibit its receipt of gifts voluntarily left it by the same decedents to be used for similar public purposes.[15] Accordingly, we submit that the Federal Government's inherent right to receive testamentary gifts is protected by the supremacy clause and is not dependent upon the grace of its subordinate states.

2. The California Supreme Court relied in large part upon *United States* v. *Fox*, 94 U. S. 315. While that case undoubtedly supports the holding of the court below, at least insofar as real property is concerned, we submit that it is demonstrably erroneous and should be overruled.

The Court there upheld the validity of a statute of New York which the courts of that state had construed in such manner as to nullify a devise of realty to the Federal Government.[16] The Court

[15] Although Congress has never enacted a general statute providing for the acceptance by the United States of testamentary gifts, the several statutes enacted at various times (see *supra*, fn. 9, p. 26) manifest a congressional policy to receive them to the fullest extent possible.

[16] It should be noted that the New York statute there concerned affected only devises of realty to the United States and that this Court accordingly spoke only of the state's exclusive control over the disposition of real estate within its borders. 94 U. S. at 320–321. The reasons upon which the United States predicates its assertion that the California statute is invalid are, however, as applicable to real property as to personal.

predicated its opinion upon the broad ground (94 U. S. at 320–321) "that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. * * * The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority." But we have seen that more recent decisions of this Court have destroyed this broad and basic assumption; there can no longer be doubt that the state's control over the transfer of property, whether *inter vivos* or testamentary, *is* subject to the limitations of the Federal Constitution. *Clark* v. *Allen*, 331 U. S. 503; *Oyama* v. *California*, 332 U. S. 633; *Shelley* v. *Kraemer*, 334 U. S. 1. See *supra*, pp. 15–22."

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[17] The evolution of constitutional restraints in this area has been roughly paralleled by the development of similar restraints over the states' power over their public domain. In *McCready* v. *Virginia*, 94 U. S. 391, rendered contemporaneously with *Fox*, this Court sustained the right of the State of Virginia to exclude citizens of other states from planting oysters in an inland stream when its own citizens had that privilege, on the ground that the citizens of Virginia "alone owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit" (94 U. S. at 396). In *Toomer* v. *Witsell*, 334 U. S. 385, however, the Court substantially limited the scope of *McCready*. There the Court held that a South Carolina statute imposing a $2,500 license fee on nonresidents for the privilege of shrimping in the three-mile maritime belt off the coast of

The *Fax* decision was, moreover, of questionable soundness even at the time it was rendered. In the first place, the Court seems to have considered the problem there raised to be whether the devolution of property within a state was governed by state or federal law. But the primary power of the states to determine who shall take testamentary gifts was not and is not disputed. The United States assumed that such power lay in the states, and merely urged, as it does here, that the United States may, as an incident to its sovereignty, take testamentary gifts even though state law purports to prohibit such devises. In the second place, the Court regarded as applicable the English Statute of Wills (Statute of 32 Hen. VIII, c. 1) which, it noted, had been carried over into New York law. But, in so doing, the Court disregarded the further principle of English common law that bequests for the benefit of the country are valid (see, *e. g., Newland* v. *Attorney-General,* 3 Meriv. 684, 36 Eng.

South Carolina while requiring resident to pay only a $25 license fee, violated the Fourteenth Amendment's privileges and immunities clause. The Court rejected the "ownership" theory on which the *McCready* case is based and distinguished that case as relating to fish in inland waters which would have remained in Virginia until removed by man, whereas the *Toomer* case concerned migratory fish in the maritime belt (334 U. S. at 400–402). See, also, *Takahashi* v. *Fish Comm'n.*, 334 U. S. 410, 420–421, in which the Court was unable to find a California "special public interest" sufficient to justify a state ban on commercial fishing by an alien ineligible to citizenship.

Rep. 262; *Nightingale* v. *Goulburn*, 5 Hare 484, 67 Eng. Rep. 1003, affirmed, 2 Phillips 594, 41 Eng. Rep. 1072; *Ashton* v. *Langdale*, 15 Jur. 868, 64 Eng. Rep. 888), and did not attempt to reconcile these principles in the light of our dual system of state and federal sovereignties with the Federal Government supreme by virtue of the supremacy clause. Cf. *Snyder* v. *Bettman*, 190 U. S. 249, 252.

In these circumstances, we submit that the Court should now overrule the *Fox* case, just as it has already overruled *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, rendered contemporaneously with *Fox*. In the *Doyle* case, this Court had affirmed a state's power to require a foreign corporation to waive its right to resort to federal courts as a condition of admission to do business in the state. It subsequently overruled that decision "because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532–533.[18]

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[18] *United States* v. *Perkins*, 163 U. S. 625, also relied upon by the California Supreme Court, is distinguishable. In that case, this Court (citing the *Fox* case) sustained the power of the states to tax a bequest to the United States on the stated ground that the states, in the exercise of their power over the descent of property, may attach any condition to their sanctioning of such devolution. See, also, *Plummer* v. *Coler*, 178 U. S. 115. Other decisions, however, have explained these

III

SECTION 27 DISCRIMINATES AGAINST THE UNITED STATES, IN VIOLATION OF THE SUPREMACY CLAUSE

As construed by the California Supreme Court, Section 27 forbids the United States, but permits the State of California and its inferior governmental units, to take testamentary gifts under the wills of Californian domiciliaries. The California Court's holding that this statute, as thus construed, did not unconstitutionally discriminate against the United States was similarly predicated on the ground that the states have exclusive power to control the devolution of property, free from constitutional limitations. "The Government's contention," the Court stated, "that if section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'un-

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cases as resting on the independent power of the states to tax the transfer of property. *Knowlton* v. *Moore*, 178 U. S. 41, 57–58; *Snyder* v. *Bettman*, 190 U. S. 249, 252. In these latter cases, this Court rejected the contention that the authority to lay a succession tax arose solely from the power to regulate the descent of property. It held, despite the intergovernmental immunity doctrine, then in full bloom, that the United States, along with the states, has power to tax transfers of property and accordingly sustained a tax levied by the United States on a bequest to a state. See, also, *Greiner* v. *Llewellyn*, 258 U. S. 384 (sustaining a federal tax on a bequest of municipal bonds). As thus explained by this Court, the *Perkins* case clearly provides no support, independently of the *Fox* case, for the holding of the California Supreme Court.

lawful discrimination against the United States' is effectively answered by the *Irving Trust Co.* case as above quoted" (B. R. 58). We have, however, shown, *supra,* pp. 14–22, that this broad basis of the decision below is erroneous, and that the power of the State of California over the devolution of property is subject to constitutional limitations, including the supremacy clause of Article VI.

Moreover, we have also shown (pp. 22–27)—and the court below has conceded (B. R. 59)—that the United States, as created by the Constitution, has the right, as an incident to its sovereignty, to receive gifts by will.

It is plain that state legislation, even in fields which are ordinarily reserved to the states, cannot constitutionally work a discrimination against rights arising under federal law. Thus, in *Pufahl* v. *Estate of Parks,* 299 U. S. 217 a receiver of a national bank had brought suit in a state court to recover from a deceased stockholder's estate the amount of the stockholder's liability under a federal statute. In holding that the law of the forum controlled with respect to matters such as the marshaling of assets, and priority of distribution, this Court commented (299 U. S. at 227):

> This is not to say that a state may deny all remedy for the substantive right arising out of the federal statute * * *; it is

merely to say that if the state does not discriminate against the receiver's claim in favor of others of equal dignity and like character, there is no warrant for exempting the claim from the effect of local statutes governing procedure or limiting the time for prosecution of action.

The petitioner, having elected to prove his claim in the appropriate state court, is bound by the laws of Illinois as to the enforcement of such claims, provided those laws are nondiscriminatory and operate equally upon all claims of the class in which his belongs.

The ground of the decision was not that the state's power to control the estates of decedents was unlimited, but that its laws did not in fact place the federal claim in a more unfavorable situation than other claims "of equal dignity and like character." In the instant case, on the other hand, there can be no doubt that the right of the United States to take by testamentary devise is discriminated against in favor of the right of the State of California; and there can be no doubt, either, that the right of the United States is of the same nature and of dignity equal to, if not greater than, the right of the State of California.

Similarly, in *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230, this Court held an Alabama statute, which discriminated against a right cre-

ated by a federal statute, to be violative of the supremacy clause. The statute there involved, as construed by the Supreme Court of Alabama, denied jurisdiction to its courts to entertain actions arising under the Federal Employers' Liability Act, while permitting similar actions arising under the laws of Alabama or any other state. In striking down that statute this Court stated (at 233–234):

> While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 387, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.

See also *Testa* v. *Katt*, 330 U. S. 386; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698; *Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U. S. 211, 222; *Second Employers' Liability Cases*, 223 U. S. 1, 57–58; *Campbell* v. *City of Haverhill*, 155 U. S. 610, 615; *Metcalf* v. *Watertown*, 153 U. S. 671.

And in *Republic Pictures Corp.* v. *Kappler,* 151 F. 2d 543, the Court of Appeals for the Eighth Circuit held that an Iowa statute limiting the time for instituting action on claims or causes of action created or growing out of federal statutes to six months, while permitting substantially longer periods for non-federal causes of action, discriminated against rights accruing under federal laws, contrary to Article VI of the Constitution. On appeal, this Court affirmed *per curiam.* 327 U. S. 757. See, also, *Rockton & Rion Ry.* v. *Davis,* 159 F. 2d 291, 293 (C. A. 4); *Caldwell* v. *Alabama Dry Dock & Shipbuilding Co.,* 161 F. 2d 83, 85–86 (C. A. 5), ceriorari denied, 332 U. S. 759; *Kampe* v. *Michael Yundt Co.,* 69 F. Supp. 753 (E. D. Wis.); *Fullerton* v. *Lamm,* 177 Or. 655.

What is true of a right conferred upon a private person by a federal statute is *a fortiori* true of a right which, under the Constitution, inheres in the United States as an essential part of its sovereignty. Any discrimination against so basic a federal right is prohibited by the supremacy clause.[19]

[19] The fact that Section 27 also declares states other than California ineligible to receive testamentary gifts is here immaterial, for the supremacy clause is not applicable in matters concerning the relationship of states *inter se.* Cf. *Testa* v. *Katt,* 330 U. S. 386, 393–394.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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Nos. 171 and 188

171

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No. 171

No. 188

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

Nos. 171 and 188

THE UNITED STATES OF AMERICA, *Appellant*, vs. JOE BURNISON and PHIL C. KATZ, Public Administrator of the City and County of San Francisco, *Appellees.*	No. 171
THE UNITED STATES OF AMERICA, *Appellant*, vs. CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, et al., *Appellees.*	No. 188

On Appeals from the Supreme Court of the State of California.

BRIEF FOR JOE BURNISON, APPELLEE.

INTRODUCTION.

In this proceeding the United States of America, Appellant, filed a petition for the allowance of an appeal by this Honorable Court pursuant to 28 U.S.C. 1257(2) which reads as follows:

> "1257—State Courts—Appeal—Certiorari.—Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> (2) By appeal, where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Said petition is for the allowance of an appeal from a judgment of the Supreme Court of the State of California construing Section 27 of the Probate Code of the State of California, which provides as follows:

> "Who may take by will. A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The said judgment of the Supreme Court of the State of California rules that the United States of America does not come within the purview of said Section 27 of said Probate Code, and that the will of deceased, one Gust Burnison, leaving all of his estate to "The United States Government, U.S.A.", is void.

The decisions of this Honorable Court and those of the highest Courts in the various States uniformly sustain the decision of the Supreme Court of the State of California.

This Honorable Court noted *probable jurisdiction* of this appeal on October 10, 1949.

Appellee Joe Burnison contends as follows:

1. This Honorable Court does not have jurisdiction of this appeal because the matter of the devolution of property by will being exclusively under the control of the Legislatures of the several states, no question as to the constitutionality of said Section 27 of said Probate Code as regards the Constitution of the United States, can be or is involved, and appellant's petition should be dismissed;

2. The judgment of the Honorable Supreme Court of the State of California construing the said Section 27 of the Probate Code of the State of California is not subject to review by this Honorable Court, even though the effect of such construction is to remove any repugnancy to the Constitution of the United States.

THE FACTS.

The facts are as stated in the introductory paragraph of the opinion of the Supreme Court of the State of California (Transcript of Record, p. 54):

> "This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to 'The United States government U.S.A.' Appellant maintains that the 'United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident' thereof, that the testamentary 'bequest' is therefore 'void', and that all of the estate should be distributed to the 'heirs at law of deceased under and pursuant to the laws of succession of' this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved."

QUESTION PRESENTED BY PETITION FOR APPEAL.

The only question presented by the said petition for appeal is as to the constitutionality of Section 27 of the Probate Code of the State of California, which designates those who may take under a will executed in the State of California.

In other words, the question *is not* as to whether the United States may accept gifts and bequests—

The question is as to the power of the State of California to designate those who may take by a will executed in the State of California.

ARGUMENT.

POINT I.

THE POWER TO DESIGNATE THOSE WHO MAY TAKE BY WILL RESTS WITH THE LEGISLATURES OF THE SEVERAL STATES, AND THE SUPREME COURT OF THE UNITED STATES DOES NOT HAVE JURISDICTION TO ENTERTAIN THIS APPEAL.

Appellee Joe Burnison contends that the power to designate those who may take by a will executed in the State of California by a resident of the State of California rests with the Legislature of the State of California; that in enacting the said Section 27 of the Probate Code, the Legislature of the State of California exercised its proper power, and definitely and purposely excluded the United States from the purview of said code section; that no federal question is involved in this appeal and this Honorable Court does not have jurisdiction to entertain this appeal, and this appeal should be dismissed.

Under the American system of government the sovereignty, in so far as it can be exercised by governmental means, is divided between the federal and the state authorities, each being sovereign in its own sphere (16 *Corpus Juris Secundum*, p. 124).

Amendment X of the Constitution of the United States reads:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Authorities are legion to the effect that the Constitution of the United States is a grant of powers, and that the federal government can exercise no powers except those specifically enumerated in the Constitution of the United States and such implied powers as are necessary and proper to carry into effect the enumerated powers.

We quote the following pertinent language from the opinion of the Supreme Court of the United States in the case of *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 315, 316 (year 1936):

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

"The two classes of powers are different, both in respect of their origin and their nature. *The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative*

powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. Carter v. Carter Coal Co., 298 U.S. 238, 294." (Emphasis ours.)

Since the year 1850 it has been the rule established by the Supreme Court of the United States that the devolution of property by will is a matter to be regulated exclusively by the Legislatures of the several states as regards real and personal property within their dominions, and that there is nothing in the Constitution of the United States to prevent the several states from designating who may or may not take by a will executed in the particular state jurisdiction with reference to property situated within said jurisdiction, and further that the right to take property by devise or bequest under a will is not an inherent right of citizenship, but is a creature of statute, to be granted or denied by the Legislature of the particular State involved.

In *Mager v. Grima,* 49 U.S. 489, 492 (8 Howard) (year 1850), the Honorable Supreme Court of the United States states as follows:

"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it." (Emphasis ours.)

And we quote from the following cases decided by the Supreme Court of the United States:

United States v. Fox, 94 U.S. 315 at 321 (year 1876):

> "Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution, in 1777; and, with some modifications in its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all.* His power is bounded by its conditions. That 'statute provides that a devise of lands may be made 'to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.'
>
> *The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government.* It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as created under the laws of the State. It was so held by the Court of Appeals in White v. Howard, 46 N.Y. 164, 165,

and its construction of the statute is conclusive upon us." (Emphasis ours.)

Maxwell v. Bugbee, 250 U. S. 525 at 536 (year 1919):

> *"The right to inherit property, or to receive it under testamentary disposition, has been so frequently held to be the creation of statutory law, that it is quite unnecessary to cite the decisions which have maintained the principle."* (Emphasis ours.)

Lyeth v. Hoey, 305 U.S. 188 at 193 (year 1938):

> *"Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction.* Mager v. Grima, 8 How. 490, 493; Maxwell v. Bugbee, 250 U. S. 525, 536, 537. *The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction.* Uterhart v. United States, 240 U.S. 598, 603." (Emphasis ours.)

Irving Trust Co. v. Day, 314 U.S. 556, 62 S. Ct. 398, 86 L.Ed. 452, 137 A.L.R. 1093, 1098 (year 1942):

> "Rights of succession to the property of deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction.* Mager v. Grima, 8 How. (U.S). 490, 12 L. Ed. 1168; United States v. Fox, 94

U.S. 315, 24 L. Ed. 192; United States v. Perkins, 163 U.S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; cf. Randall v. Kreiger, 23 Wall. (U.S.) 137, 148, 23 L.Ed. 124, 126." (Emphasis ours.)

Clark v. Allen, 331 U.S. 503 at 517 (year 1947):

"*Rights of succession to property are determined by local law. See Lyeth v. Hoey,* 305 U. S. 188, 193; Irving Trust Co. v. Day, 314 U.S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. Hauenstein v. Lynham, supra. Then the state policy must give way. Cf. Hines v. Davidowitz, 312 U.S. 52. *But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country,* United States v. Curtiss-Wright Corp., 299 U.S. 304, 316-17, *or making a compact with it contrary to the prohibition of Article I, Section 10 of the Constitution.* What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (Emphasis ours.)

The case last cited is heavily relied upon by appellant in its statement of jurisdiction, page 10, but the quotation there set forth is not complete. The complete statement quoted above sustains appellee's position that no constitutional question is involved in this proceeding and that this Honorable Court has no jurisdiction in the matter.

The Supreme Courts of the several states consistently have followed the rule established by the decisions of the Supreme Court of the United States; and the decisions of other states subscribing to the principles enunciated therein, and we quote as follows:

Taylor v. Payne (Fla.), 17 So. (2d) 615, 154 A.L.R. 677, 679:

> "The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. *Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication.* And except as the power to will property has been limited indirectly to Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. *Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation.* Accordingly, the right is at all times subject to the regulation and control by the legislative authority which creates it. *The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class* or fixing the time which must

ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. Thomas v. Williamson, 51 Fla. 332, 40 So. 831, 834; Patton v. Patton, 39 Ohio St. 590, 596; In re Noyes' Estate, 40 Mont. 178, 105 P. 1013; In re Beck's Estate, 44 Mont. 561, 121 P. 784, 1057; In re Walker's Estate, 110 Cal. 387, 42 P. 815, 1082, 30 L.R.A. 460, 52 Am. St. Rep. 104; Redfearn on Wills and Administration of Estates in Florida, pp. 42 et seq." (Emphasis ours.)

Hazard v. Bliss, 43 R.I. 43, 113 Atl. 469, 23 A.L.R. 826, 837:

"* * * the right to take property by descent or devise is not a natural one, but is a privilege granted by the state upon such condition as it may impose and subject in all respects to its regulation. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 42 L.Ed. 1037, 18 Sup. Ct. Rep. 594."

McDermid v. Bourhill, 101 Ore. 503, 199 Pac. 610, 22 A.L.R. 428, at 432:

"*It has been definitely settled that the right to take property by devise or descent is the creature of law, and not a natural right.* Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594; United States v. Perkins, 163 U.S. 625, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073; Carpenter v. Pennsylvania, 17 How. 456, 15 L. Ed. 127; Knowlton v. Moore, 178 U.S.

41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747, and extensive list of cases collected in note found in 9 Ann. Cas. 711. It has been stated: 'In most jurisdictions in the United States, it is apprehended, the capacity to make a will, whether of real estate or personalty depends entirely on statute. The legislature has plenary power to withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases.' 40 Cyc. 997." (Emphasis ours.)

Beck's Estate, 54 Mont. 561, 121 Pac. 784, at 786:

"The right to make testamentary disposition of property depends entirely upon the will of the Legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses. In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013. *A necessary postulate of this proposition is that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty.*" (Emphasis ours.)

The decisions of this Honorable Court and of the highest Courts in the several States are clearly in accord on the point that the right to take under the will of a deceased person is controlled by the Legislatures of the several States, and may be granted or withheld at the pleasure of said Legislatures.

In view of the authorities above cited it may not be said that a substantial, or any, Federal question is involved in this appeal.

The Federal question is plainly unsubstantial where its unsoundness so clearly results from the previous decisions of the Supreme Court of the United States as to foreclose the subject. (54 *American Jurisprudence,* pp. 825-826.)

This is almost the exact language used by this Honorable Court in its opinion in the case of *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255, 58 S. Ct. 865, 82 L. ed. 1323, where it is said:

> "The lack of substantiality in a federal question may appear either because it is obviously without merit or *because its unsoundness so clearly results from the previous decisions of this Court* as to foreclose the subject. *Levering & Garrigues Co. v. Morrin,* 289 U.S. 103, 105, 106." (Emphasis ours.)

Furthermore, this Honorable Court in its opinion in the case of *Consolidated Turnpike Co. v. Norfolk Etc., Railway,* 228 U.S. 596, 599, 33 S. Ct. 605, 57 L. ed. 982, stated that, assuming that a Federal question was involved:

> "* * * if also it appears that the judgment of the state court against the plaintiff in error *was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question,* though it was considered and determined by the court adversely to the plaintiff in error." (Emphasis ours.)

See to like effect

Gaar Scott & Co. v. Shannon, 223 U.S. 468, 470.

Appellee Joe Burnison respectfully submits that the decision of the Honorable Supreme Court of the State of California in this matter (Transcript of Record, p. 54) *is based upon a question of general law broad enough to support said decision.*

The question of general law involved in the present case is: *Do the Legislatures of the several States of the United States have the power to control the devolution of property by wills executed in the respective States by residents thereof?*

Certainly this is a question of general law broad enough to support the decision of the Supreme Court of the State of California. (Transcript of Record, p. 54.)

The question as to the power of the several States to control the devolution of property by wills executed within their several jurisdictions has been decided in numerous cases, and favorably to the power of the several States, by this Honorable Court and by the highest Courts of the several States. (See authorities cited above.)

Section 27 of the Probate Code of California, the constitutionality of which is in question in this proceeding, after specifically designating those who may take under a will executed in the State of California, including corporations, concludes as follows:

> *"No other corporation can take under a will unless expressly authorized by statute."* (Emphasis ours.)

The United States of America is not named as one who may take under a will executed in the State of California.

Appellee Joe Burnison contends that had it been the intention of the Legislature of the State of California to include the United States Government in said section, the United States Government would have been named as the first taker under the rule stated in *Davis v. Pringle,* 268 U.S. 315 at 318, as follows:

> *"The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause if within its purview."*

Appellant, the United States of America, freely concedes that there is no general Act of Congress or Federal statute authorizing the United States to take under the will of a deceased person.

In its brief, page 24, appellant states:

> *"Congress has never felt that a general statute authorizing the acceptance of testamentary gifts was necessary."* (Emphasis ours.)

And in this connection, we refer to the opinion of the Honorable Supreme Court of the State of California in the present proceeding which reads as follows (Transcript of Record, pp. 58-59):

> "The Government's contention that if Section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimination against the United

States' it is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a 'corporation . . . expressly authorized by statute' aid the Government in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' is such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio v. Helvering, 292 U.S. 360, 370; State of Georgia v. Evans, 316 U.S. 160, 161), *the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise or bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson v. United States, 125 Mass.

311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will.' (United States v. Fox, supra, 94 U.S. 315; United States v. Perkins, supra, 163 U.S. 625; Irving Trust Co. v. Day, supra, 314 U.S. 556.)" (Emphasis ours.)

In a number of places in its brief (pages 9, 10, 11, 12, 13, 27, 28, 29, 30, 38), the appellant, the United States of America, refers to *"the supremacy clause of the Constitution"* specifically referring to Article VI of the Constitution of the United States which provides in part as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

However, appellant does not mention in this connection Amendment X of the Constitution of the United States which provides:

"The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The obvious purpose of the people of the United States in adopting Amendment X to the Constitution was to clarify Article VI, and to eliminate any contention that the Constitution of the United States is anything other than a grant of powers, and such implied powers as are necessary and proper to carry into effect the enumerated powers, and that all powers not so granted are reserved to the several States and the people.

In *United States v. Sprague,* 282 U.S. 716, 733, 51 S. Ct. 220, 75 L. Ed. 640, in the course of its opinion this Honorable Court states:

> "The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people."

And in *United States v. Darby,* 312 U.S. 100, 123, 61 S. Ct. 451, 85 L. ed. 609, the opinion reads in part as follows:

> "Our conclusion is unaffected by the Tenth Amendment which provides: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The amendment states but a truism that all is retained which has not been surrendered. *There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state government as it had been established by the Constitution before the amendment, or that its purpose was*

other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers." (Emphasis ours.)

This being the interpretation placed upon Article VI and Amendment X of the Constitution, we are unable to understand the contention of appellant that Article VI is a "supremacy clause" which ignores the power of the several states to control their internal affairs, except where such power has been expressly delegated to the Federal Government.

There is nothing in the United States Constitution or in any Federal statute which governs the devolution of property by will. The several States always have had and still have the power, by statute, to designate the persons who may take by will.

Relying upon the provisions of Article VI of the Constitution, and *ignoring* Amendment X, appellant has cited a number of cases purporting to sustain its contentions on this appeal.

Appellant in its brief, page 9, says:

"It is 'under our Constitution (that) the devolution of property is determined by the laws of the several States'. Snyder v. Bettman, 190 U.S. 249, 252. Thus a *treaty* permitting foreign nationals to take testamentary gifts overrides, *under the supremacy clause of the Constitution,* the inconsistent provisions of state law. Clark v. Allen, 331 U.S. 503. Similarly, for example, it cannot be doubted that a restriction imposed by state

law on the right to bestow or receive testamentary gifts, *based on race or color,* would violate the Fourteenth Amendment." (Emphasis ours.)

There is no question of race discrimination involved in Section 27 of the Probate Code of the State of California.

Appellant refers to international relations—*a treaty*—as being involved in *Clark v. Allen,* 331 U.S. 503. This case strongly sustains the position of appellee Joe Burnison to the effect that the devolution of property by will is a matter within the control of the Legislatures of the several States.

We respectfully submit that appellant misapprehendss the effect of *Snyder v. Bettman,* 190 U.S. 249. In support of our contention we quote from the opinion in that case as follows (190 U.S. 250, 251, 252):

> *"This case involves the single question whether it is within the power of the Federal government,* and within the spirit of the act of Congress of June 13, 1898, 30 Stat. 448, as amended March 2, 1901, 31 Stat. 946, *to impose a succession tax upon a bequest to a municipal corporation of a State* for a corporate and public purpose * * *.
>
> "* * * if it be true that the right to impose such taxes arises solely from the right to regulate successions, then a denial of such right goes to the whole power of the government to impose a succession tax, irrespective of the question whether the legacy is made to a private individual or to an agent of the State, and the cases in this court upholding the power of the Federal government to lay such tax were wrongly decided.

"That question was exhaustively considered by this court in Knowlton v. Moore, 178 U.S. 41 * * *.

"* * * This case must be regarded as definitely establishing the doctrine that the power to tax inheritance does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. *It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States.*" (Emphasis ours.)

Oyama v. California, 332 U.S. 633, involved a *gift* from an alien Japanese to his son, not a testamentary disposition of property.

Shelly v. Kramer, 334 U.S. 1, involved race discrimination.

As stated above, there is no question as to the power of the United States to receive voluntary bequests. *The question here is as to the power of the Legislatures of the several States to control the devolution of property by will.* The decisions of this Honorable Court are to the effect that *the state law determines what persons are qualified to inherit property within the jurisdiction.*

Appellant relies upon *Dickson v. United States*, 125 Mass 311. In that case, the Court states:

"The decision in United States v. Fox, 94 U. S. 315, affirming S. C. 52 N. Y. 530, by which it was held that a devise by a citizen of New York of real estate in New York to the government of the United States was void, proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state. That decision has no application to this case. *The statutes of this Commonwealth where the testator had his domicile, and part of his real estate lay, make no restriction as to who may be devisees or legatees; and there is no evidence before us that any such restriction is made by the laws of Iowa, where the rest of the real estate is situated.* Gen. Sts. c 92, §§ 1, 2. Jackson v. Phillips, 14 Allen, 539, 552, 589, 591. Fellows v. Miner, 119 Mass. 541. Lorings v. Marsh, 6 Wall. 337, 355. Ould v. Washington Hospital, 95 U. S. 303." (Emphasis ours.)

POINT II.

THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA CONSTRUING SECTION 27 OF THE PROBATE CODE OF THE STATE OF CALIFORNIA IS NOT SUBJECT TO REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

As stated by this Honorable Court in the case of *Aero Transit Mayflower Co. v. Board of Railroad Commissioners*, 332 U. S. 495 at 499, 68 S. Ct. 167:

> *"The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes, by the state courts."* (Citing authorities.) (Emphasis ours.)

The appellant recognizes this principle of law, but in the same breath denies it, stating in its brief, page 13, as follows:

> "*The decision below as to the proper construction of Section 27 is, of course, final here,* and the United States does not now raise, any question in regard thereto. The United States does, however, claim that Section 27 as so construed, is unconstitutional as applied to it." (Emphasis ours.)

Here the appellant again relies upon Article VI of the Constitution and ignores the provisions of Amendment X.

In this proceeding we are dealing strictly with a *state matter,* to-wit, the power of the several States to determine what persons are qualified to inherit property within the jurisdiction. (See authorities cited above.)

Appellee Joe Burnison contends that the decision of the Honorable Supreme Court of the State of California construing said section 27 of the Probate Code is not subject to review by this Honorable Court.

We quote from the opinion of this Honorable Court in the case of *Quong Ham Wah Co. v. Industrial Accident Commission of the State of California,* 255 U.S. 445, 41 S. Ct. 373, 65 L. ed. 723, at 725, as follows:

> "But it is elementary that this court is without authority to review and revise the construction affixed to a state statute *as to a state matter* by the court of last resort of the state. (Citing numerous authorities.) *It is hence obvious that*

> *the proposition upon which alone jurisdiction to entertain the writ can be based is so wanting in foundation as to be frivolous,* and therefore to impose upon us the duty to dismiss the cause for want of power to entertain it. (Citing numerous authorities.)" (Emphasis ours.)

Further, we quote from *Consolidated Turnpike Co. v. Norfolk, Etc., Railway,* 228 U.S. 596, at 599, 33 S. Ct. 605, 57 L. ed. 982 where this Honorable Court says that, assuming that a Federal question was involved,

> "* * * if also it appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, *this court will not consider the Federal question, though it was considered and determined by the court adversely to the plaintiff in error.*" (Emphasis ours.)

In this proceeding there is involved solely and purely a state matter. *The decision of the Supreme Court of the State of California is based upon a question of general law broad enough to sustain it.* This Honorable Court should sustain said decision, and dismiss appellant's petition.

CONCLUSION.

For the foregoing reasons, and in view of the authorities cited above, it is respectfully submitted that appellant's Petition for Appeal on file herein should

be dismissed, or the judgment of the Supreme Court of the State of California should be affirmed.

Dated, December 2, 1949.

CASPER A. ORNBAUN,
Attorney for Joe Burnison, Appellee.

HARRY N. GROVER,
EVERETT H. ROAN,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1949

In the Matter of the Estate of EMILY P. SANBORN, DECEASED

THE UNITED STATES OF AMERICA, APPELLANT,

v.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, BEN ROY, GERTRUDE BARRON, MARGELIA GILE BERNARD, ELTEEN KNOWLES, RALPH THIBAULT, GLENN THIBAULT, ANGELIA NICHOLS, EDNA L. KING, FERNE L. THIBIDEAU, LEONA M. DICKINSON, EDITH M. DICKINSON, GENEVA GILE FULLER, HERMAN GILE, HAROLD GILE, FLOYD GILE, SHERMAN GILE, EARLAND GILE, RENA GILE, GEORGE GILE, CHESTER GILE AND LA FOREST GILE, APPELLEES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The date of the judgment entered by the Supreme Court of California is March 22, 1949. The petition for appeal is

presented to the Supreme Court of the United States herewith, to wit, on June 15, 1949.

JURISDICTION

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the decision in this case is conferred by Section 1257(2) of Title 28, U.S.C., as codified by the act approved June 25, 1948, effective September 1, 1948. The following cases are believed to sustain the jurisdiction of the Supreme Court: *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U.S. 261; *Standard Oil Co. of California* v. *Johnson, Treasurer of the State of California,* 316 U.S. 481; *United States* v. *Klein,* 303 U.S. 276.

STATE STATUTE INVOLVED

The statute of the State of California which was held to be valid but which the appellant contended was unconstitutional is the Probate Code of California, particularly Section 27, which provides as follows:

> *Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute.

THE ISSUES AND THE RULING BELOW

Upon her death on February 4, 1945, Emily P. Sanborn, a resident in the County of Los Angeles left a will dated June 12, 1942 (Tr.[1] 2, 4, 31-32). Item III of the will provided: "I hereby give, devise and bequeath unto the UNITED STATES OF AMERICA, all of my bonds issued by the United States Government, which stand in my name and which I may hereafter acquire in my name, and all of the real properties and interests in such properties which I now own and of which I shall or may die seized or possessed" (Tr. 32).

Annie L. Harris, an heir at law, petitioned the Superior Court of the State of California in and for the County of Los Angeles to admit this will for probate, which she alleged was the last will of the deceased (Tr. 53). In her petition, she stated that Willis Sargent named in the will as executor had declined to act as such executor and prayed that Letters of Administration with-the-will-annexed be issued to her (Tr. 53, 57). She further declared "her hostility to Item III of said Will" and that "at the appropriate time and by appropriate proceedings she will object to distribution of said estate under the terms of said Item III on the ground that a testamentary disposition may not be made to the UNITED STATES OF AMERICA under the provisions of Section 27 of the Probate Code of the State of California" (Tr. 57). After a contest, this will was admitted for probate and Letters of Administration with-the-will-annexed were issued to Annie L. Harris (Tr. 34-36, 39).

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[1] References, unless otherwise noted, will be to the pages in the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California and which is included in the transcript certified to this Court.

The administratrix thereafter filed a petition for final distribution, alleging that although the United States claimed to be entitled to have distributed to it all of decedent's United States Government Bonds and all of her real property, the United States was not eligible to take these gifts under Section 27 of the Probate Code and the heirs at law were entitled to distribution of the whole estate (Tr. 1, 8-9). The Superior Court, noting that the United States objected to the heirs' petition, entered a decree of final distribution, in which it ordered the distribution to the United States, in accordance with the provisions of Item III of the will, of the deceased's United States Savings Bonds and cash representing monies received as net income from real property and conversion values of real property sold in the proceedings in the amount of $12,689.78 (Tr. 25, 27).

The heirs appealed to the Supreme Court of California (Tr. 44). In an opinion rendered the same day as that in the *Estate of Burnison*, 33 Cal. Adv. 613, the Supreme Court of California, one judge dissenting, reversed, on the authority of the *Burnison* case, 33 Cal. Adv. 621. The Court stated (p. 622):

> The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the *Estate of Burnison*, this day decided, *ante*, p. [P. 2d]. * * *

In addition to its contentions in the *Burnison* case, which it likewise urged here, the United

States relied on two statutes (Act of April 3, 1945, 59 Stat. 48 c. 51, § 4; 31 U.S.C.A. § 757e; Act of March 3, 1903 (32 Stat. 1112, c. 1007, § 1; 40 U.S. C.A. § 304), which, it claimed, established its authority to take the bonds and real estate left it by the decedent. It contended that if state law alone does not authorize the bequest and devise to the United States, "it must be read together with the Federal law in order to give effect to the Federal right and to avoid the unconstitutional discrimination that otherwise would result." The Court rejected that contention with the comment (pp. 622-623):

> * * * such congressional enactments, by their provision for the government's disposition of such testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. (*Estate of Burnison, supra.*) * * *

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case is a companion to *Estate of Burnison* and presents the same questions as those presented in the *Burnison* case, *i.e.*, whether a state may deny to the United States the right to receive a gift willed to it by a decedent domiciled in that state, and whether Section 27 of the Probate Code of California, as construed by the Supreme Court of California, has a discriminatory effect against

the United States in violation of Article VI of the Constitution.

In addition to the discussion as to the substantiality of these questions set out in the Statement as to Jurisdiction in the *Burnison* case, which is hereby incorporated by reference and to which the Court is respectfully referred, it should be noted that Congress, by the Act of April 3, 1945, 59 Stat. 48, 31 U.S.C. 757e [2] and the Act of March 3, 1903, 32 Stat. 1112, 40 U.S.C. 304 [3] expressly recognized the authority of the United States to take by will the kind of property here involved, *i.e.*, United States saving bonds and real property. The California Supreme Court's construction of these statutes, that they "can be regarded as no more than implied recognition of the power of the United States to take property but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question," is, as are its holdings in the *Burnison* case, premised on that court's holding that the states' power to determine the descent of property within its jurisdiction is not subject to constitutional limitations. Once, the sovereign power of the United States, created by the Constitution, to receive testamentary gifts

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[2] "Whenever any direct obligation of the United States, bearing interest or sold on a discount basis, is donated to the United States, is bequeathed by will to the United States, become [So in original.] the property of the United States under the terms of a trust, or is by its terms payable upon the death of the owner to the United States or any officer thereof in his official capacity, the Treasurer of the United States upon receipt of such obligation shall effect redemption thereof. * * *"

[3] "The Secretary of the Treasury is authorized to sell such lands as have been or may be acquired by the United States by devise, upon such terms and after such public notice by advertisement as he may deem best for the public interest."

is recognized, it becomes clear that these statutes, properly read, authorize the United States to receive by will bonds and real estate such as here involved, thereby bringing into sharp focus the failure of the California Supreme Court to give effect to the sovereign right of the United States to receive testamentary gifts and that Court's discrimination against the United States, in violation of Article VI of the Constitution

There are appended hereto a copy of the opinion of the Supreme Court of California in the instant case together with a copy of the opinion of the Supreme Court of California and the District Court of Appeal, State of California, First Appellate District in the *Burnison* case.

THE UNITED STATES OF AMERICA.
By: PHILIP B. PERLMAN,
Solicitor General.

OPINION OF THE SUPREME COURT

SPENCE, J.—Testatrix, a resident of Los Angeles, devised and bequeathed to the "United States of America" all her real property in this state and her government bonds. The will contains no residuary clause so that in the event of the failure of such devise and bequest, such property would descend to the decedent's heirs at law under the laws of succession. In the probate proceedings, the court ordered distribution of the mentioned property in pursuance of the terms of the will. From the portions of the decree of final distribution accordingly entered in favor of the "United States of America," the heirs bring this appeal.

[1] The only question here presented is whether the challenged testamentary disposition to the "United States of America" is valid under the laws of this state. The parties advance the same opposing contentions in relation to the construction of section 27 of the Probate Code, prescribing "who may take by will," as were considered and resolved in a like situation prevailing in the *Estate of Burnison*, this day decided,[1] *ante*, p. — [P. 2d]. The only additional point here made relates to the pertinency of the government's reference to two specific federal statutes as establishing the "authority of the United States to take by will." One is the Act of April 3, 1945 (59 Stats. 48, c. 51, § 4; 31 U.S.C.A. § 757e), declaring that "the Treasurer of the United States . . . shall effect redemption" of "any direct obligation of the United States" (such as government bonds) that "is bequeathed by will to the United States"; and the other is the Act of March 3, 1903 (32 Stats. 1112, c. 1007, § 1; 40 U.S.C.A. § 304), authorizing "the Secretary of the Treasury . . . to sell such lands as have been or may hereafter be acquired by the United States by devise." However, such congressional enactments, by their provision for the government's disposition of such

[1] Advance Report Citation: *Ante*, p. 613.

testamentary gifts, can be regarded as no more than implied recognition of the power of the United States to take property by will, but only where such act would be in accordance with the law of the state governing the right to make the testamentary disposition in question. Certainly such federal statutes cannot validate a "devise" or "bequest" of property in this state made by a California resident contrary to our statutory law. (*Estate of Burnison, supra.*) Accordingly, the objections of the heirs to the claims of the "United States of America" under the terms of the decedent's will must be sustained.

The portions of the decree here subject to appeal are reversed.

Gibson, C. J., Shenk, J. Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

Traynor, J., dissented.

OPINION OF THE SUPREME COURT IN THE BURNISON CASE

SPENCE, J.—This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and 13 nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States Government U.S.A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident" thereof, that the testamentary "bequest" is therefore "void", and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

[1] At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*In re Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460]; see, also, *Estate of Carpenter*, 172 Cal. 268, 269 [156 P. 464, L.R.A. 1916E 498]; *Estate of Wilkinson*, 113 Cal. App. 645, 646 [298 P. 1037].) The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. (*Estate of Durlewanger*, 41 Cal. App. 2d 750, 752 [107 P. 2d 477]; *Estate of Bauer*, 51 Cal. App. 2d 636, 637 [124 P. 2d 630].) [2] As a necessary postulate of this proposition, it follows that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. (*In re Wilmerding*, 117 Cal. 281, 284 [49 P. 181].)

[3] Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by the law of his domicile. (*Estate of Sloan*, 7 Cal. App. 2d 319, 333-334 [46 P. 2d 1007].) It was early recognized in decisions of this state—as *Estate of Apple*, 66 Cal. 432, 436-437 [6 P. 7]; *Whitney* v. *Dodge*, 105 Cal. 192, 197-198 [38 P. 636]; *Estate of Lathrop*, 165 Cal. 243, 247 [131 P. 752]—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "who may take by will," must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporate religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for

religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[4] The government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a "testamentary disposition," as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification (23 Cal. Jur. § 109, p. 730; *Taylor* v. *Lundblade*, 43 Cal. App. 2d 638, 641 [111 P. 2d 344]; *Gayer* v. *Whelen*, 59 Cal. App. 2d 255, 262 [138 P. 2d 763]), and the government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as "the state," the draftsmen of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the Legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." (*United States* v. *Cooper Corporation*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], citing *Davis* v. *Pringle*, 268 U. S. 315, 318 [45 S. Ct. 549, 69 L. Ed. 974].) Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. (23 Cal. Jur. § 110, p. 732; *People* v. *One 1940 Chrysler Coupe*, 48 Cal. App. 2d 546, 549 [120 P. 2d 117].) Here the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify

California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. (Amendments to the codes, 1873-74, p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept . . . any gift, bequest and devise . . ." (Stats. 1881, p. 2.) In 1903, section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. (Stats. 1903, p. 258.) In 1905, the section was further amended to permit "counties" and "municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises (Stats. 1905, p. 605), and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 1275.) Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for 24 years. Then in 1931, when, upon adoption of the Probate Code, the Legislature added to the list of entities privileged to take under a California will "the state" in connection with "counties" and

"municipal corporations," it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York provided that a devise of lands might be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question presented for consideration was "the validity of a devise to the United States of real estate situated in the State of New York" The Supreme Court of the United States declared (as the state court had, 52 N. Y. 530, 534 [11 Am. Rep. 751]) that "this question" was "to be determined by the laws of [New York]," (94 U. S. 320.) Then the court, speaking through Mr. Justice Field, stated at page 321 as follows: "The term 'person' as here used supplies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State [New York], is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of a testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of *United States* v. *Perkins*, 163 U. S. 625 [16 S. Ct. 1073, 41 L. Ed. 287], wherein the "single question" pre-

sented was "whether *personal* property bequeathed by will to the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute and within legislative control" (p. 627), and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy" (pp. 629-630), the court, following citation of the *Fox* case, *supra,* sustained the propriety of the tax—in "diminution" of the amount of the United States would receive under the will—as it was "only upon [such] condition that the legislature assent [ed] to [the] bequest" (p. 630). And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day,* 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093], wherein was contained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra,* among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) (See also, *Allen* v. *Markham,* 156 F. 2d 653, 659; *Clark* v. *Allen,* 331 U. S. 503, 517 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953].)

The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise, the attack upon the pertinency of the basic reasoning in the Fox case, *supra,* and the claim that assuming "the

Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation . . . expressly authorized by statute" aid the government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body" (see *State of Ohio* v. *Helvering*, 292 U. S. 360, 370 [54 S. Ct. 725, 78 L. Ed. 1307]; *State of Georgia* v. *Evans*, 316 U. S. 159, 161 [62 S. Ct. 972, 86 L. Ed. 1346]), the further requirement of the section is concededly unsatisfied in the government's admission that though "various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property." [5] It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator has his domicil" effecting a restriction as to who may be devisees or legatees." (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

[6] Nor does it strengthen the government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to . . . the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemptions, and in making laws relating to these two subjects, over which it had plenary authority, the Legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. (*In re Wilmerding, supra,* 117 Cal. 281, 286-287.) There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws (*Estate of Lindquist,* 25 Cal. 2d 697, 705 [154 P. 2d 879], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988]; *Estate of Walker,* 25 Cal. 2d 719, 720 [154 P. 2d 891], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988, 1989]) or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances (*United States* v. *Stevens,* 302 U. S. 623 [58 S. Ct. 388, 82 L. Ed. 484]: *Mauck* v. *United States,* 94 F. 2d 745). But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. (*United States* v. *Perkins, supra,* 163 U. S. 625, 629.)

The government finally relies on the *Estate of Hendrix,* 77 Cal. App. 2d 647 [176 P. 2d 398], to sustain the bequest in question, but an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the "United States Veterans Administration . . . for the purpose of rendering to disabled veterans of the world war . . . such aid, comfort, [and] as-

sistance . . . as may to them be most helpful and profitable, determinable by said . . . [organization]." (P. 649.) As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers' " (p. 652), the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property . . . [which would] embrace gifts by means of wills, as well as by transfers during the lifetime of the donors." (P. 653.) Upon classifying the Veterans Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California (Prob. Code, § 27), the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America" (p. 651), that "the United States Government is a corporation" (p. 652), that "the [agency] is authorized by statute to take property by will" (p. 652), and that therefore the United States Government, functioning through one of its component parts in a designated field of operation, is a "corporation . . . expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. (P. 653.) But the validity of the bequest there involved need not rest on that ground, for, as the court indicated in its reference to the analogous considerations prevailing in the *Estate of Yule*, 57 Cal. App. 2d 652 [135 P. 2d 386], the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" (p. 654), and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor" (*Estate of Yule, supra*, p. 654), and the further discussion in

the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code" (p. 650) was unnecessary to the decision, and certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the government's reliance upon the Hendrix case in nowise strengthens its position here. In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will," the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

Gibson, C.J., Shenk, J., Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

TRAYNOR, J.—I dissent for the reasons set forth in *Estate of Hendrix,* 77 Cal. App. 2d 647, 651-653 [176 P. 2d 398].

OPINION OF THE DISTRICT COURT OF APPEAL IN THE BURNISON CASE

GOODELL, J.—The decedent, a resident of San Francisco, left a will reading as follows:

"June 30, 1932,
205—3rd St.,
San Francisco, California.

This is my last Will & Wish
That I give all I own & possess to the United States government U.S.A.
The beneficiary shall be executor
My body shall be cremated after death

Signed Gust Burnison,
Approved July 27, 1944."

The testator left personal property appraised at $22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

"At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*Estate of Walker,* 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460].)

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdic-

tion." (*Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093].)

[1] By section 27 of the Probate Code our Legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state," the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance. Surely if the Legislature had intended to include the federal government it would have named it. As aptly said in *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], "'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the Legislature adopted "An Act to authorize the several counties, cities and counties, cities and towns of this State, . . . to receive prop-

erty by gift, bequest, and devise, . . . (Stats. 1881, p. 2.) In 1905, an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27.) Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for 24 years. In 1931, then, when the Legislature added "the state" in connection with "counties" and "municipal corporations" it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the govenment of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court held (as the state court had, 52 N. Y. 530 [11 Am. Rep. 751]) that this question had to be determined by the laws of New York. The court, speaking through Mr. Justice Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devises of real property while the instant case deals with a bequest of personalty. The reasoning of the Fox case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal force to this case. Indeed the Supreme Court as recently as 1942 in the Irving Trust Co. case, *supra*, cited the Fox case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the Irving Trust Co. case. Its claim that, assuming "that the Fox case cannot be distinguished, it must be regarded as overruled," is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether the words "authorized by statute" found in the last sentence of section 27 mean a statute of this state only, or one of any state, or an act of the Congress, for the government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has purported to authorize the United States to so acquire property."

The government relies chiefly on *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398] and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration," an agency of the government. For the reasons appearing in the Hendrix opinion the questions presented in that case and in this are quite dissimilar. [2] This bequest is to the United States of America, without quali-

fication. It is not to any agency of the government, incorporated or unincorporated, or to the government as trustee, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the Fox case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Code Civ. Proc., § 1858).

The government relies, also on *Dickson* v. *United States,* 125 Mass. 311 [28 Am. Rep. 230], where the court held valid a devise and bequest to the United States of America. In distinguishing the Fox case the court said that that case "proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees . . ." The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

Nourse, P.J., and Griffin, J. pro tem., concurred.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 188 **188**

THE UNITED STATES OF AMERICA,
Appellant,

v.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, BEN ROY, GERTRUDE BARRON, MARGELIA GILE BERNARD, ELTEEN KNOWLES, RALPH THIBAULT, GLENN THIBAULT, ANGELIA NICHOLS, EDNA L. KING, FERNE L. THIBIDEAU, LEONA M. DICKINSON, EDITH M. DICKINSON, GENEVA GILE FULLER, HERMAN GILE, HAROLD GILE, FLOYD GILE, SHERMAN GILE, EARLAND GILE, RENA GILE, GEORGE GILE, CHESTER GILE, AND LA FOREST GILE, *Appellees*

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM AND ACKNOWLEDGMENT OF SERVICE THEREOF.

J. HAROLD DECKER,
J. FRANK MARTIN, JR.,
J. P. PATTERSON,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 188

In the Matter of the Estate of EMILY P. SANBORN, *Deceased*

THE UNITED STATES OF AMERICA,
Appellant,

v.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, BEN ROY, GERTRUDE BARRON, MARGELIA GILE BERNARD, ELTEEN KNOWLES, RALPH THIBAULT, GLENN THIBAULT, ANGELIA NICHOLS, EDNA L. KING, FERNE L. THIBIDEAU, LEONA M. DICKINSON, EDITH M. DICKINSON, GENEVA GILE FULLER, HERMAN GILE, HAROLD GILE, FLOYD GILE, SHERMAN GILE, EARLAND GILE, RENA GILE, GEORGE GILE, CHESTER GILE, AND LA FOREST GILE, *Appellees*

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, the Appellees herein above named, submit herewith their statement making against the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case, showing that the questions on which a decision depends are so unsubstantial as not to need further argument.

Statement of Facts

The Appellees are some of the heirs-at-law of Emily P. Sanborn, deceased, and the matters stated by Appellant in its summary of the issues and the ruling below contained in its statement as to jurisdiction include a statement of the facts involved therein.

I

The record does not present for decision any substantial Federal question for the reason that this Court has heretofore foreclosed any such question by its previous decisions. The matter was first presented to this Court in *United States* v. *Fox*, 94 U. S. 315. The facts therein presented involved the validity of a testamentary disposition of real property situated in the State of New York by a resident of that state to the Government of the United States. The New York Statute, which was construed, provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise".

Mr. Justice Field in delivering the opinion of this Court stated:

> "The sole question for our consideration in this case is the validity of a devise to the United States of real estate situated in the State of New York. The question is to be determined by the laws of that State. It is not pretended that the United States may not acquire and hold real property in the State . . .
>
> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposi-

tion of immovable property, whether by deed or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick* v. *Sullivant*, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State . . .

"Every person must, therefore, devise his lands in that State within the limits of the statute or he cannot devise them at all. His power is bound by its conditions . . .

"A devise to the United States of real property situated in that State is, therefore, void".

The question was again presented in *Irving Trust Co.* v. *Day*, 314 U. S. 556, in which this Court was asked to invalidate a statute of descent and distribution of the State of New York upon the ground that it impaired the obligation of a contract in violation of the Fourteenth Amendment. The statute bestowed certain rights to a surviving spouse to elect to take property under the will or under the laws of succession. The rights thus bestowed were contrary to the terms of a document executed prior to the effective date of the statute, which document purported to be an ante-nuptial contract. In upholding the validity of the New York statute this Court said at Page 562:

"The rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or

> even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima*, 8 How. (U.S.) 490, 12 L. Ed. 1168; *United States* v. *Fox*, 94 U. S. 315, 24 L. Ed. 192; *United States* v. *Perkins*, 162 U. S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; cf. *Randall* v. *Kreiger*, 23 Wall. (U.S.) 137, 148, 23 L. Ed. 124, 126".

The case of *United States* v. *Fox*, supra, is no isolated expression of this Court's decision on the issue herein involved. It was cited with approval in *United States* v. *Perkins*, 163 U. S. 625, 628 wherein this Court spoke:

> "We know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good".

Again in *United States* v. *United Mine Workers of America*, 330 U. S. 258, 275 *United States* v. *Fox*, supra, was cited as supporting the statement that in common usage the term "person" does not include the sovereign and statutes employing it will not ordinarily be construed to do so.

As late as 1946 in *United States* v. *Standard Oil Company* 332 U. S. 301, 308, this Court cited *United States* v. *Fox*, supra as supporting the statement that in many situations,

> ". . . rights, interests, and legal relations of the United States are determined by application of State law, where Congress has not acted *specifically*. (Emphasis supplied) . . . The Government, for instance may place itself in a position where its rights necessarily are determinable by State law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. Cf. *United States* v. *Fox*, 294 U. S. 315, 24 L. Ed. 192".

Again *United States* v. *Fox*, supra, was cited by this Court in *O'Keeffe* v. *Adams*, 314 U. S. 572, in dismissing

an appeal involving the validity of a Florida statute respecting the rights of descent and distribution for want of a substantial Federal question.

Not only was *United States* v. *Fox*, supra cited in *Irving Trust Company* v. *Day*, supra, but the latter case was approved and cited by this Court in *Demorest* v. *City Bank Farmers Trust Company*, 321 U. S. 36, 48 as supporting the statement that rights to succession by will are created by the State and may be limited, conditioned, or abolished by it.

A brief reference to the following cases is respectfully suggested as further indication that the question herein presented has been heard and decided by this Court:

Jones v. *Habersham*, 107 U. S. 179, holding that the uniform course of decisions of this Court is such as to remove all doubt that the validity of devises and bequests as against the heirs at law depends on the law of the State in which the land lies and the testator resides;

Langdon v. *Sherwood*, 124 U. S. 74, holding that the mode of conveyance of real property is subject to the control of the legislature of the State wherein the land lies;

Mackie v. *Story*, 93 U. S. 589; *Henderson* v. *Griffin*, 30 U. S. 151; and *Hood* v. *McGehee*, 237 U. S. 611 were cases in which this Court ruled that a decision of the highest court in a State construing a state statute of wills and succession is binding upon the Supreme Court of the United States. In the latter case Mr. Justice Holmes succinctly put the rule as: A State is the sole mistress of the devolution of its land by descent;

Arndt v. *Griggs*, 134 U. S. 316, wherein *U. S.* v. *Fox*, supra, was cited to substantiate the principle that title to real property and methods of determining any unsettled questions concerning it is the duty of the State within which the land is located and the manner of accomplishing this is local in

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IN THE

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October Term, 1949.
No. 188

THE UNITED STATES OF AMERICA,

Appellant,

vs.

CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, *et al.*,

Appellees.

An Appeal From the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

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IN THE

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THE UNITED STATES OF AMERICA,

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CHARLES F. GAYETTY, ANNIE L. HARRIS, GEORGE E. BREECE, *et al.*,

Appellees.

An Appeal From the Supreme Court of the State of California.

BRIEF FOR APPELLEES.

Opinions of the Court Below.

The opinion of the Supreme Court of the State of California [Tr. 32-33], from which this appeal was taken, was written in connection with its decision in the *Estate of Burnison*, after both cases were argued together before said court. The issues in both cases being practically identical, the Supreme Court of California wrote the principal decision in the *Burnison* case and in its decision in the instant case referred to and in part adopted the decision in the *Burnison* case. The decision of the Supreme Court of California in the *Burnison* case is on appeal before this court under No. 171, October Term, 1949. The official citation of the Supreme Court of California in the instant case is 33 Cal. 2d 647, and the official citation of that court in the *Burnison* case is 33 Cal. 2d 638.

its nature; it is not a matter of federal concern or vested in the general government;

Hutchinson Investment Co. v. *Caldwell*, 152 U. S. 65, citing *U. S.* v. *Fox*, supra, in supporting the holding that the question of descent and heirship of real estate is exclusively governed by the law of the place where the land is situated;

Magoun v. *Illinois Trust and Savings Bank*, 170 U. S. 283, holding the right to take property by devise or descent is a creature of law and not a natural right, and therefore the authority which confers it may impose conditions upon that right and citing *Mager* v. *Grima*, 8 How. 490 as authority for the proposition that an imposition of a tax on legacies was no more than an exercise of the power which every state and sovereignty possesses of regulating who shall and who shall not be capable of taking property within its dominion by will or succession;

Plummer v. *Coler*, 178 U. S. 115, again declaring that the right to take property by will or descent is derived from and regulated by local law.

These decisions by this Court reflect a uniform holding on the issue presented by this appeal and in view of such uniformity no further argument is required. In *Spies* v. *Illinois*, 123 U. S. 131, 164 this Court in considering a petition for a writ of error said:

> "In our opinion the writ ought not to be allowed by the Court, if it appears from the face of the record that the decision of the Federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well considered judgments in similar cases. . . . When . . . a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when 'the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument.'

Arrowsmith v. *Harmoning*, 118 U. S. 194, 195; *Church* v. *Kelsey*, 121 U. S. 282."

It is well settled that a motion to affirm the judgment is to be granted if the questions on which the decision depends are so wanting in substance as not to need further argument. *Hodges* v. *Snyder*, 261 U. S. 600. A Federal question requiring no analysis and exposition for its decision is frivolous and the motion to dismiss should be granted. *Milheim* v. *Moffat Tunnel District*, 262 U. S. 710. But it is a real, substantial Federal question on which the case may be made to turn and not merely a formal Federal question that is essential to the jurisdiction of this Court. If a question is presented which has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, a motion to dismiss should prevail. *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 366; *Pennsylvania Hospital* v. *Philadelphia*, 245 U. S. 20; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123.

It is submitted that the conclusions of the Supreme Court of the State of California in so far as they dealt with the right of the State to regulate the testamentary disposition of the property of one of its residents and in particular the real property situated within its dominion were clearly in accord with the decisions of this Court. There can be now, in view of the many decisions of this Court on the subject, no room for challenging the general proposition that it is within the exclusive power of the State to regulate the modes of acquisition and transfer and the rules of the descent and the extent to which a testamentary disposition may be made of the property within its jurisdiction.

II.

This Court does not have jurisdiction of this appeal for the reason that no real federal question is involved. The Supreme Court has no jurisdiction to review the judgment of a state court unless a real, and not a fictitious federal question is involved. *Hamblin* v. *Western Land Co.*, 147 U. S. 531; *St. Louis C. G. and Ft. S. Ry. Co.* v. *Missouri*, 156 U. S. 478.

As stated by the court in *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79:

> "The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked solely for the purpose of delay."

Section 27 of the Probate Code of the State of California, excluding the United States as a lawful taker under a will (so construed by the Supreme Court of the State of California in the instant case), does not violate any provisions of the Constitution of the United States or any Act of Congress. The Constitution does not in any of its provisions, either expressly or by implication, deprive the states of the right to regulate tenure of property through testament or succession. Such power is therefore reserved to the states under the Tenth Amendment. The Constitution does not in any of its provisions, either expressly or by implication, give Congress such power. Therefore, if Congress had assumed such power, which it has not, its act would be unconstitutional. *South Carolina* v. *U. S.*, 199 U. S. 451; *U. S.* v. *Butler*, 297 U. S. 1; *Buffington* v. *Day*, 11 Wall. 124.

In Appellant's Statement As to Jurisdiction the substantiality of its position is based in part upon the thesis that the Act of April 3, 1945, 59 Stat. 48, 31 U. S. C. A. 757e, and

the Act of March 3, 1903, 32 Stat. 1112, 40 U. S. C. A. 304, recognize the authority of the United States to take by will. Even though Congress had the constitutional right to regulate tenure of property through testament, it is apparent that these acts do not purport to do so, for they express no more than mere recognition of the right of the United States to take property by will. In this connection it is appropriate to note that the legislatures of a great majority of the states have not seen fit to enact statutes similar to Section 27 of the Probate Code of the State of California. The only reasonable interpretation of these Acts is that Congress has given the United States the right to accept testamentary gifts from testators in those states. Congress having not thereby attempted to regulate the tenure of property through testament, it cannot be said that Section 27 of the Probate Code of the State of California as interpreted by the Supreme Court of the State of California is in conflict with either of these acts.

In Appellant's Statement As to Jurisdiction the only other point relied upon is that Section 27 of the Probate Code of the State of California, as interpreted by the Supreme Court of the State of California in the instant case is a "discrimination against the United States, in violation of Article VI of the Constitution".

However the supremacy of the Constitution and Statutes of the United States cannot be said to be all inclusive. They are supreme only when they have spoken and when silent as to a right or a power, the supremacy as to that right or power is reserved to the States. *South Carolina* v. *U. S.*, supra. By the decision of the lower court interpreting Section 27 there has been no failure to recognize such supremacy for the reason that, as pointed out hereinabove, the Constitution does not deny a state the right to control the disposition of the property within its dominion by will or succession nor does any Federal statute, properly

construed within the limitations of the Constitution, govern such testamentary powers.

Any discrimination against the United States is not in violation of Article VI of the Constitution nor of any statute of the United States, but is merely the exercise of the sovereign right of a state to regulate the testamentary privileges of its citizens.

No cases have been offered by Appellant which in any way effect the principles set forth in the decisions of this Court, herein cited.

It is submitted that the nature of this case and the rulings of this Court are not such as to bring this appeal within the jurisdiction of this Court and that any question under the Constitution of the United States either as respects Section 27 of the Probate Code of the State of California or the decision of the Supreme Court of the State of California is foreclosed by previous decisions of this Court and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss.

Wherefore, Appellees move that this Honorable Court enter its order dismissing the appeal or, in the alternative, enter its order affirming the judgment of the Supreme Court of the State of California, said motion being made upon the ground that this Court does not have jurisdiction of said appeal for the reason that the nature of this case is not such as to bring this appeal within the jurisdiction of this Court and for the reason that the questions presented therein are unsubstantial.

Respectfully submitted,

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By J. P. PATTERSON,
Attorneys for Appellees.

Jurisdiction.

A timely motion was made by the respondents herein that this appeal be dismissed or the judgment of the Supreme Court of California be affirmed, upon the grounds stated and the authorities cited in the motion. (See Statement Opposing Jurisdiction and Motion to Dismiss or Affirm.) On October 10, 1949, the court made an order noting probable jurisdiction [Tr. 38]. Although we believe that this order may not finally determine the motion and that the court may yet grant the same, we proceed to argue the appeal upon the merits.

Summary of Argument.

Under the first point we will show that throughout the judicial history of the United States it has universally been the settled law that the matter of devolution of property and rights of succession should be left to the legislatures of the several states; that this principle of law has been recognized and applied not only by the courts of last resort of the states but by this court in an unbroken line of decisions; that in this line of decisions is the leading case of *U. S. v. Fox*, 94 U. S. 315; a case as nearly in point as a researcher could expect to find as a parallel to the case at hand, and which has been followed on this point and cited with approval by courts of the states and by this court so often as to become the leading case on the subject.

Under the second point we will argue that although the United States as a sovereign entity may have the *capacity* to take property under a will valid in the state of its creation, there is nothing in the Constitution, either expressly or by the kind of implication heretofore recognized by this court, reposing in the United States the *right* to

take property under a will invalid under the law of the testator's domicile; that it may well be that the United States has the legal capacity to accept, but such capacity to accept must coincide with a right conferred upon the donor to make the gift; that in the absence of such a right in the donor the mere capacity to accept vests no rights and the enjoyment of such capacity is thus dependent upon the validity of the gift; that the validity of a testamentary gift must be tested by the laws, in the absence of a conflict with an express provision of the Constitution, of the state which controls the subject of the gift and not by the laws of the Federal Government which at best merely acknowledge the capacity of the legatee to receive; and that the United States was not granted by the Constitution the right or power by administrative policy to declare, nor through Congress to provide laws, validating a testamentary gift to ~~it which under the~~ law of the state of its creation is invalid.

Under the third and fourth points we will demonstrate that to now overrule *U. S. v. Fox, supra,* and the settled law built upon it as a cornerstone, as demanded by the Government, would be without reason or necessity and would strike at the heart of our dual system of government and the rights of the states under the Tenth Amendment to the Constitution; we will argue that, although the vacuum theory of absolutism of judicial construction and application of the Constitution under *stare decisis* deserves no commendation, yet we will urge not only on principle but under the cases cited that only the most cogent reasons should exist to overrule a decision of this court which has been relied upon as a precedent for many years; and that no such reason exists to now overrule *U. S. v. Fox, supra.*

ARGUMENT.

POINT 1.

The Right to Regulate Testamentary Disposition of Property Is, and Always Has Been, Within the Exclusive Province of the State in Which the Property Is Located.

In approaching this phase of the argument it is well to bear in mind that there are few rules of law more firmly settled than the postulate that there is no inherent right in anyone to make a will and that the Legislature of each state may impose restrictions and limitations on the testamentary act.[1] Likewise the right to make a will is not a natural right nor a right of citizenship, nor is it a right guaranteed by the Constitution.[2] The cases cited in the note are only a few of the earlier cases upon the subject. We shall not attempt to cite herein or quote from all of the cases in the United States supporting the above statements since we feel that those cited in the note and the United States Supreme Court decisions hereinafter cited

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[1]*Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 487; *Lewark v. Dodd*, 288 Ill. 80, 123 N. E. 260; *In re Evans Estate*, 193 Iowa 1240, 188 N. W. 774; *In re Noyer Estate*, 40 Mont. 178, 105 Pac. 1013; *Matter of Delano*, 176 N. Y. 486, 48 N. E. 871; *Haldeman v. Haldeman*, 343 Ill. 550, 174 N. E. 890; *State v. Duncan*, 302 Mo. 130, 257 N. W. 784; *Porter v. Union Trust Co.*, 182 Ind. 637, 108 N. E. 117; *In re Evans Will*, 193 Iowa 1240, 188 N. W. 774; *Marett v. Broom*, 160 S. C. 91, 158 S. W. 216; *Upham v. Plankinton*, 152 Wis. 274; *Epperson v. White*, 156 Tenn. 155, 299 S. W. 812.

[2]The ownership of property does not give rise to the right to dispose of it after death. *In re Sherwood's Estate*, 122 Wash. 648, 211 Pac. 734. The right to take property by will is not a Natural right. *In re Bradbury's Estate*, 210 Iowa 1013, 231 N. W. 661; *In re Wilkinson's Estate*, 113 Cal. App. 645, 289 Pac. 1037; *White v. Howard*, 38 Conn. 342; *Jones v. Hunter*, 6 Rob. (La.) 285; *Herber's Succession*, 128 La. 111; *Hailey v. McLaurin*, 112 Mass. 705.

and quoted from will sufficiently indicate the universality of the rule that the right to make a will is a creature of statute and that it is exclusively subject to the government in whose jurisdiction the property is situated. Except for *U. S. v. Fox, supra,* these cases are cited on general principle and did not involve the precise question of whether a testamentary gift to the United States is void or valid. Argument that this general prinicple is applicable to testamentary gifts to the United States; that no constitutional question is involved in so applying it; and that where, as in the case at bar, a state statute, in the regulatory plan of its internal affairs, has chosen to except the United States as a lawful taker, no provision of the Constitution or constitutional act of Congress has been violated, is reserved to the second point in this brief.

The leading case in the United States is *U. S. v. Fox,* 94 U. S. 315, being one of the cases upon which the Supreme Court of California bottomed its decision in the instant case. This case is peculiarly applicable to the case at bar, because there was involved in that case a statute of New York, similar to Section 27 of the Probate Code of California, the statute construed by the Supreme Court of that state in the decision from which this appeal was taken. The only real distinction between the two statutes is that the New York statute dealt only with real property, whereas in the California statute no distinction is made between real and personal property. In that case as here the question was whether a will donating property to the United States was valid. In holding that under the New York statute a will to the United States was void, this court said at page 321:

> "The term 'person' as here used applies to natural persons, and also to artificial persons—bodies politic,

deriving their existence and powers from legislation—*but cannot be so extended as to include within its meaning the Federal Government. It would require an express definition to that effect, to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as are created under the laws of the State.* It was so held by the Court of Appeals in White v. Howard, 46 N. Y. 164, 165, and its construction of the statute is conclusive upon us. *A devise to the United States of real property situated in that state is therefore void."*[8] (Italics ours.)

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[8]"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, *and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted.* It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick v. Sullivan,* 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos or testamentary,* are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the state.

"Statutes of wills, as is justly observed by the Court of Appeals, are enabling Acts, and prior to the Statute of 32d Hen. VIII. there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution in 1777; and, with some modification of its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all. His power is bounded by its conditions."* (Italics ours.) (*U. S. v. Fox,* 94 U. S. 315.)

In holding that where one who made a pre-emptory entry died before the patent was issued, his heirs took the land after the patent issued, this court said that the disposition of immovable property,

> "whether by deed, descent or other mode is *exclusively* subject to the government within whose jurisdiction the property is situated." (Italics ours.) *Hutchinson Inv. Co. v. Caldwell*, 152 U. S. 65, 68.

In *U. S. v. Perkins*, 163 U. S. 625, the question was whether personal property bequeathed to the United States was subject to inheritance tax of New York. In holding that it was, the court said at pages 627-628—

> "the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. * * * Certainly if it be true that the right of testamentary disposition is purely statutory, the State has the right to require a contribution to the public treasury * * *"

(See also, *Plummer v. Cole*, 178 U. S. 115.)

In *James v. Habersham*, 107 U. S. 174, 179, the court said:

> "According to the uniform course of decisions of this court the validity of these devises, as against the heirs at law, depends upon the law of the State in which the lands lie, and the validity of the bequests, as against the next of kin, upon the law of the State in which the testatrix had her domicile."

(See also, *Brine v. Insurance Co.*, 96 U. S. 627.)

In *Arndt v. Griggs,* 134 U. S. 316, this court held that the duty to determine methods of determining unsettled questions respecting title to real estate is with the state and that it is not a matter of federal concern. (See also, *Hutchinson v. Caldwell, supra.*)

In *Magoun v. Ill. Trust Co.,* 170 U. S. 283, this court cited a number of decisions of this court and in construing them said that they were based upon the principles that an inheritance tax is not a tax on property but on succession and that the right to take property by devise or descent is a creature of law and not a natural right. In holding the inheritance tax involved in that case to be valid the court said at page 289, in quoting *Mager v. Grima,* 80 How. 490, 493:

> "Now, the law in questoin is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real and personal, within its dominion may be transmitted by last will and testament, or by inheritance; *and of prescribing who shall and who shall not be capable of taking it.*" (Italics ours.)

This court said in *Plummer v. Cole,* 178 U. S. 115, 137:

> "We think the conclusion, fairly to be drawn from the state and Federal cases, is, that the right to take property by will or descent is derived from and regulated by municipal law."

In *Kansas v. Colorado,* 206 U. S. 46, wherein this court in a case outstanding for its importance, holding that

state laws concerning the general reclamation of arid lands cannot be overridden by Congress, said at page 93:

> "It is enough for the purposes of this case that each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters."

In 1944 this court said in *Demarest v. City Bank Co.*, 231 U. S. 36, 48, "Rights to succession by will are created by the state and may be limited, conditioned or abolished by it." The court in this case cited *Irving Trust Co. v. Day*, 314 U. S. 556, in which this court was asked to invalidate a statute of descent upon the ground that it impaired the obligation of a contract in violation of the Fourteenth Amendment. The statute bestowed certain rights upon a surviving spouse to elect to take property under the will or under the laws of succession. The rights thus bestowed were contrary to the terms of a document executed prior to the effective date of the statute, which document purported to be an ante-nuptial contract. In upholding the validity of the New York statute this court said at page 562:

> "The rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

Mackie v. Story, 93 U. S. 589; *Henderson v. Griffin*, 30 U. S. 151; and *Hood v. McGehee*, 237 U. S. 611, were cases in which this court ruled that a decision of the highest court in the state construing a state statute of wills and succession is binding upon the Supreme Court of the United States. In the latter case, at page 615, Mr. Justice Holmes succinctly put the rule as follows: "Alabama is sole mistress of the devolution of Alabama land by descent."

From the foregoing authorities there can be no doubt that, since the states have the right to regulate the testamentary act and provide to whom a testamentary disposition may be made, it was within the right of the Legislature of California to enact Section 27 of the Probate Code of that state, eliminating the United States as a proper beneficiary, unless in so doing some right granted to it by the Constitution was violated. To the thesis that no such right was granted and that the United States has no sovereign right under the Constitution to enforce a testamentary gift in the face thereof, Point 2 of this brief will be devoted.

POINT 2.

The Sovereignty of the United States With Respect to Testamentary Privileges Confers at Best Only the Capacity to Receive Testamentary Dispositions, and the United States Has No Sovereign Right Under the Constitution to Enforce a Testamentary Gift to It in the Face of a State Statute Prohibiting the Making of Such Gift.

There exists in the reasoning of law, as well as logic, a basic distinction between a right to give and a right to receive. To complete a valid gift, these rights must be coexistent, for if either is lacking, the gift cannot be consummated. If the right to give is absent, the gift is void. If the right to receive is absent, the gift must fail. Thus, it follows that the right to give bestows a power to transfer upon the donor, and the right to receive invests the donee with the capacity to accept. Thus, in the case of testamentary gifts the state which controls the subject of the gift controls the right of the testator to make the gift. To determine if the donor has the right of disposition, the laws of that state must be used as a guide. To determine if the United States has the capacity to accept such a gift, the Constitution and the Acts of Congress must be used as a guide.

The recognition that the sovereign right of the United States to receive a testamentary gift is no more than a capacity is apparent from the following:

> "But the right to receive money or property, voluntarily contributed, is not a separate power, but a *capacity* belonging to the United States as a body politic and incident to the right of sovereignty—." (Italics ours.) *Dickson v. United States,* 125 Mass. 311, 313-315.

It is therefore at once evident, in view of the authorities cited under Point 1 herein, that this court has recognized without exception that in the enactment of laws such as Section 27 of the Probate Code of the State of California, the state was acting within its constitutional sphere of regulating the rights of its domiciliaries to make testamentary gifts, while the Congress, in enacting the statutes referred to in appellant's brief[4] was acting within its constitutional sphere of enunciating at most the capacity of the Treasurer of the United States and the Secretary of the Treasury to accept a gift.

Appellant in its brief, page 25, concedes that the Congress has assumed that the United States has "inherent *capacity* to receive testamentary gifts" in enacting these statutes and by enacting special legislation to deal with the receipt of bequests for designated purposes it has assumed the *"capacity* of the United States to receive the gift." (Italics ours.) Consequently it is easily understood why testamentary gifts have been accepted by the United States from testamentary donors whose domicile was in one of the many states without a statute similar to Section 27 of the California Probate Code.

In considering the sovereign rights of the United States we cannot ignore the corresponding rights of the states in all matters not bestowed upon the national government. The supremacy of the United States, as declared in the Constitution, is not all-inclusive, and "so long as the dual form of government endures, the states, it must never be forgotten, are as independent of the general government

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[4]The Act of April 3, 1945, Chap. 51, 59 Stat. 48, 31 U. S. C. 757e, and the Act of March 3, 1903, 32 Stat. 1112, 40 U. S. C. 304.

as that government within its sphere is independent of the states." *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 364.

> "Each (government) within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other." *In re Heff*, 197 U. S. 488, 505.

In concise language this court has summarized its recognition of the relativity of federal supremacy and state supremacy in *South Carolina v. U. S.*, 199 U. S. 437, 452:

> "In other words, the two governments, National and State, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers."

The Constitution authorizes both governments to exercise their authority and to the national government in its own sphere must be the preservation of the right to use the powers bestowed by the people under the Constitution and to the state government the right to use all of the rest of the original aggregate power of the people remaining after the Federal grant, each without undue influence by the other. *Educational Films Corp. v. Ward*, 282 U. S. 379.

Appellant's argument of supremacy of the United States as a sovereign under Article VI of the Constitution presupposes that that instrument has in fact granted rights, within the field in question, to the United States. Having established the distinction between the power to give and

the power to receive, we at once see that nowhere in the Constitution nor in the federal statutes is the national government given the right to regulate the testamentary devolution of property, and that therefore that right was reserved to the people and the states under the Tenth Amendment, and that where there is no conflict between the laws of the state in exercising such a reserved right and the provisions of the Constitution and Acts of Congress enacted pursuant thereto, the state and not the national government is entitled to the incidents of supremacy. *McCulloch v. Maryland,* 4 Wheat. 316.

As the court said in *Stainback v. Mo Hock Ke Lok Po,* 93 U. S. Adv. 581, 69 S. Ct. 606, 611:

> "In our dual system of government, the position of the state as sovereign over matters not ruled by the Constitution requires a deference to state legislative action * * *."

It is not suggested that the right of the state to so regulate the devolution of its property is completely unabridged by the federal Constitution in cases where it clearly appears that such a state right is limited by a clear constitutional grant of federal power to so limit. Thus, where a treaty is in conflict with a state statute (*Clark v. Allen,* 331 U. S. 503) the provisions of the treaty must be held to be supreme, but only because of the express provision of Article VI of the Constitution making such a treaty the supreme law of the land. No other instance appears in which this court has held that the Constitution in any way limits the right of a state to regulate the

testamentary disposition of property within its jurisdiction.[5] Indeed, this court in *O'Keefe v. Adams*, 314 U. S. 572, dismissed an appeal from a decision of the Supreme Court of Florida, in which appeal the validity of a Florida statute of succession, as construed by the Florida court, was challenged as being repugnant to the equal protection clause of the Fourteenth Amendment. The appeal was dismissed by this court, citing *U. S. v. Fox, supra*, for want of a substantial federal question.

As hereinafter pointed out, the sovereign power of the United States has frequently been invoked, in the absence of an express constitutional grant of such power, to enable the national government to perform some function as incidental and reasonably necessary to an express power. However we know of no instance in which such sovereign power has been recognized unless the exercise of that power had been attempted by the Congress in enacting legislation incidental to and reasonably necessary for the complete function of constitutional government. Nowhere in the Constitution is the United States given such sovereign power, as an incident to which exists the necessity to regulate the making of testamentary gifts. Nor has Congress enacted any legislation attempting to so regulate. Indeed such Congressional action, if attempted,

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[5]In *Maxwell v. Bugbee*, 250 U. S. 525, 541, this court said:

"It has been uniformly held that the Fourteenth Amendment does not deprive the States of the right to determine the limitations and restrictions upon the right to inherit property, but, 'at most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority.'"

would itself be in violation of the Tenth Amendment, as an invasion of powers reserved to the states.

Recognizing the dual nature of our government and the supremacy of both the national and state governments in their respective spheres, it is submitted that the sovereignty of the United States does not extend to the right to regulate testamentary devolution of property by enforcing a gift to it, in the face of a statute, limiting the right of the testator, enacted by a state within its constitutional sphere of supremacy. Nor has Congress, in its enactments, attempted to validate a gift which is void under the laws of a state.

This cannot be argued to be an infringement upon the sovereignty of the Federal government. There are many situations in which rights, interests and legal relations of the United States are determined by application of state law. *Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania,* 318 U. S. 261. As this court said in *United States v. Standard Oil Co.,* 332 U. S. 301, 308:

> "The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim. *Cf. United States v. Fox,* 94 U. S. 315."

Nor could Congress extend the constitutional sphere of the national government for expediency, or for moral or political purposes, or for any other reason, into the realm of state sovereignty. In *Linder v. United States,* 268 U. S. 517, this court accepted

> "as established the doctrine that any provision of an Act of Congress ostensibly enacted under power

granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly reserved to the states, is invalid and cannot be enforced".

Thus the mere fact that the United States may be deprived of a source of revenue is no justification for an invasion of the states' sovereign sphere, when there is no constitutional right to that revenue. In that connection it must be remembered that the right of the state to control its property is based in part on the natural and just desire for self preservation, which desire is respected and contemplated by the Constitution,[6] and to add this source of revenue to the United States would be to deny to the state its revenue through *ad valorem* taxes thereon.

The sovereignty of the United States with respect to testamentary gifts being limited to the capacity to receive such gifts, such sovereignty cannot be constitutionally extended into the sphere of state sovereignty to force the consummation of such a gift in disregard of a state statute declaring such a gift void as being beyond the right of the testator to make.

A contrary conclusion would require not only the repudiation of *United States v. Fox*, 94 U. S. 315, but an unprecedented invasion into the rights reserved to the states as discussed in Point 3 hereof.

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[6]"The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 7 Wall. 700, 725. Accord: *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352.

POINT 3.

The Contention That the Doctrine of U. S. v. Fox Should Be Repudiated Is to Disregard the Rights Reserved to the States Under the Tenth Amendment.

That *U. S. v. Fox, supra,* is controlling in this case is beyond doubt. To hold for the government would be to repudiate and expressly overrule it. The appellant in its brief (App. Br. p. 33), in referring to that case, says, "While that case undoubtedly supports the holding of the court below, at least so far as real property is concerned, we submit that it must be overruled." Why? The Constitution of the United States is the same today as it was at the time of *U. S. v. Fox, supra,* with the exception of the Amendments thereto which have been passed since that time. The basic principles which it pronounced have not changed, nor has anything occurred since that time to require a construction not then given to it insofar as concerns the right of the United States to receive a testamentary gift as against Section 27 of the California Probate Code, as interpreted by the Supreme Court of the State of California in the instant case. As will be hereinafter more fully pointed out in Point 4 of this brief, *Clark v. Allen,* 331 U. S. 503; *Oyama v. California,* 332 U. S. 633; and *Shelley v. Kraemer,* 334 U. S. 1, relied upon by the appellant (App. Br. p. 34), fall far short as authority for the proposition that a testamentary gift bad at the time of *U. S. v. Fox* is now good. In view of the issues raised on this appeal we commend to the court a

review of *U. S. v. Fox, supra,* and the principles which it announced. In determining whether to give ear to the demand of the appellant that it be overruled, we ask that the court consider the often repeated postulate that although this court should review its former decisions and overrule them when they are erroneous, it should do so with great care. *U. S. v. Fox, supra,* has been cited with approval by state courts and by this court in a multitude of cases, not cases involving the precise question of the valadity of a testamentary gift to the United States, but cases relying upon the general principle of the decision. The latest of these is *U. S. v. Standard Oil,* 332 U. S. 301. The court, at page 308, cited *U. S. v. Fox* for the statement, "The Government, for instance, may place itself in a position where its rights necessarily are determinable by state law, as when it purchases real estate from one whose title is invalid by that law in relation to another's claim." Another recent case by this court which cited *U. S. v. Fox, supra,* with approval is *U. S. v. Mine Workers,* 330 U. S. 258. There the court said, at page 275, "The act does not define 'persons.' In common usage that term does not include sovereign, and statutes employing it will ordinarily not be construed to do so." *Irving Trust Co. v. Day,* 314 U. S. 556, was a case involving a state statute alleged to violate the contract clause of the Constitution. The court said at page 562 that "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction. * * * *U. S. v. Fox,* 94

U. S. 315." In the note[7] are some of the many other cases in which *U. S. v. Fox, supra,* has been cited by this court with approval.

In effect, the appellant is asking that this court overrule *U. S. v. Fox, supra,* and declare a right in the government which has never heretofore been recognized, on the basis of a hypothetical sovereignty existing separate and apart from the Constitution. This thesis is directly contrary to the view of this court expressed in *Kansas v. Colorado,* 206 U. S. 46, 88: "Yet while so construed (meaning the Constitution) it still is true that no independent and unmentioned power passes to the National Government. * * *" Federal sovereignty exists only within the realm of the constitutional grant of powers, limited to those powers expressly granted and those incidental powers reasonably necessary to carry the expressed powers into execution. As pointed out elsewhere in this brief, no right to take by or to regulate the making of wills was delegated to the United States expressly, nor has the government shown what expressly delegated power needs be implemented by its right to deprive the states of their exclusive prerogative to say who may or may not take by will. To overrule *U. S. v. Fox, supra,* and reverse the Supreme Court of California in the instant cases would, we respectfully submit, engraft upon the law a new doctrine of implied powers of the Federal Government.

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[7]*U. S. v. Cooper Corp.*, 312 U. S. 600, holding "person does not include sovereign." *Plummer v. Cole*, 178 U. S. 115; *Magoun v. Ill. Tr. Bank*, 170 U. S. 283; *U. S. v. Perkins*, 163 U. S. 625; *Hutchinson v. Caldwell*, 152 U. S. 65; *Arndt v. Griggs*, 134 U. S. 316; *Langdon v. Sherwood*, 124 U. S. 74; *Jones v. Habersham*, 107 U. S. 174; *Brine v. Ins. Co.*, 96 U. S. 627.

POINT 4.

The Argument of Appellant Is Unsound and Suggests Untenable Application of Constitutional Concepts, Leading to an Unconstitutional Result.

The argument of appellant under its Point I seems to be based upon this syllogism: That where an attempted exercise of power to limit the testamentary act collides with the Federal Constitution, the states' power must give way; that Section 27 of the California Probate Code, as interpreted by the Supreme Court of that state, does collide with a constitutional power belonging to the United States; therefore Section 27 is void insofar as it affects the United States. The difficulty with this logic is that one of the terms is based upon an untrue and unproved premise, leading, of course, to an erroneous conclusion. The untrue and unproved premise in this line of reasoning is that Section 27 does collide with a constitutional power belonging to the United States. We have heretofore pointed out in this brief that at no place in the Constitution was the United States granted the right to claim constitutional power to take by will as against a state statute prohibiting it. We do not contend that the reserved right of states to control devolution of property is absolute and unlimited under all circumstances and conditions. Hence, we find no fault with the cases cited by appellant in support of its erroneous conclusion. We do, however, contend that they are not controlling in the case at bar, and now proceed to point out their inapplicability.

Clark v. Allen, 331 U. S. 503, involved a statute prohibiting gifts of real and personal property to a German alien in violation of a *treaty* between the United States

and Germany. That the right to make treaties with foreign powers was one of the rights granted to the Federal Government and that its right in this field is supreme, is implicit in the Constitution.[8] Thus, *any* state statute operating to interfere with the treaty making power or with an existing treaty is in violation of the Constitution. Clearly no treaty is involved in the instant case. In citing and relying upon *Clark v. Allen, supra,* appellant has placed itself in an incongruous position, for the reason that, as authority, that case weighs heavily in support of our position. It was held in that case that the treaty involved covered real property and not personal property and that thus the statute involved violated the treaty as to real, but not as to personal property. The case recognizes the principle contended for throughout this brief. At pages 517 this court said:

> "Rights to succession to property are determined by local law. See *Lyeth v. Hoey,* 305 U. S. 188, 193; *Irving Trust Co. v. Day,* 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauestein v. Lynham, supra.* There the state powers must give way. *Ex. Hines v. Davidowitz,* 312 U. S. 52. *But here there is no treaty governing the right to succession of the personal property*" (Italics ours.)

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[8]Article II, Section 2, The Constitution of the United States: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur." Article VI, The Constitution of the United States: "This Constitution, and the laws of the United States *which shall be made in pursuance thereof;* and all *treaties* made or which shall be made, under authority of the United States, shall be the supreme law of the land." (Italics ours.)

Oyama v. California, 332 U. S. 633, cited by appellant, was a case involving the rights of a *citizen* under the Fourteenth Amendment. The case holds that a statute of California, forbidding aliens ineligible for citizenship to own or acquire agricultural land violated the Fourteenth Amendment, as a deprivation of equal protection of the California laws and his rights as an American citizen. That the rights given under the Fourteenth Amendment were intended to protect only *individuals* as to the matters therein prohibited is clear from the contemporaneous exposition as well as the judicial history of the Constitution. (See The Constitution of the United States, compiled in the Legislative Reference Service, Library of Congress, pp. 765, *et seq.*) So far as we can find, it has never been urged that the United States is a *citizen* or *person* under the Fourteenth Amendment.

Shelley v. Kraemer, 334 U. S. 1, is equally inappropriate for the same reason as pointed out above. In that case this court held that race restrictive covenants were in violation of the equal protection clause. We have been unable to find any case holding that the Federal Government is entitled to the same constitutional protection of equality as are persons. None are cited by appellant, and, in view of the careful differentiation in the Constitution of rights and privileges of the Federal Government, the states, citizens, and persons, we believe that none exist. The Government is not a "person," and the "ordinary dignities of speech" rule excluded it as such in an action for treble damages under the Sherman Act. *U. S. v. Cooper Corp.*, 313 U. S. 604. (See also, *Davis v. Pringle*, 268 U. S. 315, and *U. S. v. Mine Workers, supra.*)

The appellant attempts to make capital of the words "overriding federal policy," used in *Clark v. Allen, supra*

(App. Br. p. 19), in its comment on the *Irving Trust Co.* case. We submit that the court in *Clark v. Allen* in using the word "policy," was referring to the policies of the Constitution, and meant that the "state policy must give way" only where it comes in conflict with rights or powers under the Constitution, as distinguished from general federal policies designed by departments or agencies of the government.

Point II of appellant's brief, when reduced to an hypothesis, is that as an incendence of sovereignty it has the right to receive testamentary gifts; hence Section 27 of the California Probate Code violates the supremacy clause. Like the argument set forth in appellant's first point, the conclusion is erroneous because the premise cannot be proved. In Point 2 of this brief we have shown the difference between a right and a capacity. We do not quarrel with the thesis that the United States may receive testamentary gifts from citizens of states whose legislatures have not seen fit to pass laws similar to Section 27 of the California Probate Code. We do, however, deny that the capacity to do so arises to the dignity of an absolute right, as against a statute which, under the rights reserved to the states, prohibits it. Emphasis is placed by appellant (App. Br. p. 73) upon *Dickson v. U. S.*, 125 Mass. 311. This case cannot be helpful in the case at bar, because the State of Massachusetts had no law similar to Section 27 of the California Probate Code. However, as hereinbefore pointed out, that case recognized a distinction between a right to take and a capacity to receive. For the most part, the cases cited by appellant in its brief in support of the premise that the United States has a constitutional right to take by will, are cases wherein

rights of the United States have been extended by implication to include such rights as are reasonably necessary to carry into effect the expressed powers. These involved the necessity of eminent domain, to enter into contracts, to take security for debts, and to sue in its own name. In these cases and many others where power of the Federal Government had been implied in order to carry the expressed powers into effect, there has been some reasonable nexus of necessity between the expressed power and that sought to be implied. It would be a challenge to ingenuity to attempt to provide such nexus between *any* expressed power in the Constitution and the right of the Government to force the consummation of a testamentary gift which is void under the laws of the state of its creation, and we note a paucity of any such attempt in appellant's brief. If the Government needed any of the real property in The Sanborn Estate for any federal purpose, it could take it under its power of eminent domain. *Kohl v. U. S.*, 191 U. S. 367. That the necessity for the taking by the Government of money or other personal property by will does not exist, is implicit in the constitutional plan for the raising of revenue. Article One, Section 8 of the Constitution provides: "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense." If the government is arguing that it is necessary for it to take by will in order to raise revenue, this is an abvious absurdity and should require no further argument in rebuttal.

Appellant, in B-1 of its second point (App. Br. p. 27), introduces its argument with the statement, "It is clear from the foregoing that the United States has the right to receive testamentary gifts and that that right flows

from its sovereignty created by the Constitution." It then goes on to argue that to deny it this right offends the Supremacy Clause. Again the appellant has fallen into error by assuming an unproved and erroneous premise, *i. e.*, that the United States has the *right under the Constitution* to receive testamentary gifts. Its conclusion that the Supremacy Clause is violated thus fails for invalidity.

We submit that *U. S. v. Snyder*, 149 U. S. 210, *U. S. v. Alleghany County*, 322 U. S. 174, and the cases cited on page 32 of appellant's brief and the argument thereunder ignore the issue in this case. That a lien of the government is effective against property of an estate, being entitled to priority over state liens, or that debts due to the Government are entitled to priority, whether due from a decedent's estate or opposed by a state's claim for taxes, the propositions for which some of these cases stand, is neither controlling nor helpful. These cases for the most part involved Congressional statutes, all passed under constitutional powers of Congress. As was held in *State of Michigan v. U. S.*, 317 U. S. 338, 340, cited by appellant (App. Br. p. 32), "The establishment of a tax lien by Congress is an exercise of its constitutional power 'to lay and collect taxes,' Article 1, Section 8 of the Constitution." We have attempted to make it clear in this brief that we do not question the supremacy of any constitutional law of Congress. We do, however, question the validity of the use of cases properly recognizing supremacy of constitutionally granted federal powers as authority for the application of the Supremacy Clause to a case where the Tenth Amendment and not Article VI of the Constitution is involved. The case of *Terral v. Burke*

Construction Co., 257 U. S. 529, cited by appellant (App. Br. p. 36), is a case of that kind, *i. e.*, one in which the state was denied the right to refuse a foreign corporation access to the federal courts in violation of Article III of the Constitution.

In Point III of appellant's brief (App. Br. p. 37) it is contended that Section 27 of the Probate Code of California, as construed by the Supreme Court of that state, discriminates against the United States. We believe that this Point and the argument thereunder add nothing to the other points raised by appellant in its brief, and that it has been adequately answered in the foregoing pages of this brief. It again assumes a false premise, *i. e.*, that the Federal Government has a *constitutional* right to receive a testamentary gift as against a state statute prohibiting it. Certainly there can be no right in a state to discriminate against rights arising under the Constitution, but we have shown that no constitutional right exists in the Federal Government to receive or enforce a testamentary gift to it prohibited by a state statute. If the right to determine who may take by will is with the states as a part of their reserved rights, as we believe we have shown, how can it be said that discrimination against the United States could arise out of the exercise of such right, in the absence of any constitutional right in the United States to take by will in the face of a state statute declaring the gift void. The decisions of the Supreme Court cited by appellant on this point (App. Br. p. 40) are for the most part cases where remedial state laws were

an obstacle to the enforcement or full enjoyment of some federal law constitutionally enacted to carry out a constitutional power. The distinction between such cases and the case at bar is thus clearly apparent.

In appellant's brief, *Snyder v. Bettman,* 190 U. S. 249, is cited numerous times as authority for appellant's position. (App. Br. pp. 9-18-36-37.) On pages 9 and 18 it is cited as authority for the proposition that the Constitution governs the devolution of property, and thus the United States by virtue of its constitutional sovereignty has superior rights in that field to the rights of the states. The quotation from the case by appellant (App. Br. pp. 9-18) eliminates certain words and supplies another so that the inference which appellant desires is naturally reached. However, the true and complete quotation clearly sets forth that the court in that case assumed that under our dual system of government it is the statutory right of the state to regulate the descent of property.[9] It is interesting to note that this case cites *U. S. v. Perkins, Plummer v. Coles, Knowlton v. Moore* and *Magoun v. Illinois Trust Co.,* all cited *supra,* in support of our contention herein.

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[9]"This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, *or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states.*" (Italics ours.) *Snyder v. Bettman,* 1948 U. S. 249, 252.

Conclusion.

The right to regulate succession to property, including the right to say to whom a testamentary gift may be made, was not granted to the Federal Government, but was reserved to the states and to the people by the Tenth Amendment to the Constitution; that where, as in the case at bar, that right has been exercised by a state through its Legislature, it is controlling, unless in the exercise thereof it conflicts with a right or power expressed in the Constitution, or a right or power reasonably necessary to carry into effect one of the expressed rights or powers; that there is no right or power granted to the United States by the Constitution to enforce a testamentary gift to it and that none can be implied as necessary to carry into effect any expressed power; that, therefore, Section 27 of the California Probate Code prohibiting testamentary dispositions to the United States is a valid exercise of that state's constitutional power and that to contend for its invalidity is to contend for an unconstitutional result.

It is respectfully submitted that the decision of the Supreme Court of California herein should be affirmed.

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